

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF WASHINGTON

3
4 UNITED STATES OF AMERICA

5 Plaintiff,

6 v.

CIVIL ACTION NO. _____

7 PORT OF TACOMA;
8 OCCIDENTAL CHEMICAL
9 CORPORATION; MARIANA
PROPERTIES, INC.; AND
PIONEER AMERICAS LLC.

10 Defendants.

11
12 **RD/RA CONSENT DECREE**
13 **MOUTH OF HYLEBOS WATERWAY PROBLEM AREA**
COMMENCEMENT BAY NEARSHORE/TIDEFLATS SUPERFUND SITE

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27 CONSENT DECREE
Commencement Bay Nearshore/Tideflats
Superfund Site
28 Mouth of the Hylebos Waterway Problem Area

United States Department of Justice
Environment & Natural Resources Division
Environmental Enforcement Section
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I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Hylebos Waterway Problem Areas ("Hylebos Waterway Problem Area") within the Commencement Bay Nearshore/Tideflats Superfund Site in Tacoma, Washington ("CB/NT Site"), together with accrued interest; and (2) performance of studies and response work by the defendants at the Hylebos Waterway Problem Area consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Washington Department of Ecology ("State") on December 26, 2000 of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Hylebos Waterway Problem Area, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the Washington Department of Ecology, National Oceanic and Atmospheric Administration of the U.S. Department of Commerce, the Fish and Wildlife Service of the U.S. Department of Interior, the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe, and the

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1 Bureau of Indian Affairs on December 26, 2000 of negotiations with potentially responsible
2 parties regarding the release of hazardous substances that may have resulted in injury to the
3 natural resources under the trusteeship of the Natural Resource Trustees and encouraged the
4 trustees to participate in the negotiation of this Consent Decree.

5 E. The defendants that have entered into this Consent Decree ("Settling
6 Defendants") do not admit any liability to the Plaintiff arising out of the transactions or
7 occurrences alleged in the complaint, nor do they acknowledge that the release or threatened
8 release of hazardous substances at or from the CB/NT Site and/or the Occidental Site constitutes
9 an imminent or substantial endangerment to the public health or welfare or the environment.

10
11 F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the CB/NT
12 Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in
13 the Federal Register on September 8, 1983, 48 Fed. Reg. 40,658.

14 G. In response to a release or a substantial threat of a release of hazardous substances
15 at or from the CB/NT Site, EPA entered into a CERCLA Cooperative Agreement with the State
16 of Washington, through the Department of Ecology ("Ecology") to conduct a Remedial
17 Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430.

18
19 H. Ecology completed a Remedial Investigation ("RI") Report on contaminated
20 sediments and sources in the CB/NT Site and the results were published in August 1985. The
21 results of the Feasibility Study ("FS") were published in February, 1989.

22 I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of
23 the completion of the FS and of the proposed plan for remedial action for the CB/NT Site, on
24 February 24, 1989, in a major local newspaper of general circulation. EPA provided an

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1 opportunity for written and oral comments from the public on the proposed plan for remedial
2 action. A copy of the transcript of the public meeting is available to the public as part of the
3 administrative record upon which the Regional Administrator based the selection of the response
4 action.

5
6 J. The decision by EPA on the remedial action to be implemented at the CB/NT Site
7 is embodied in a final Record of Decision ("ROD"), executed on September 30, 1989, on which
8 the State and Puyallup Tribe of Indians gave their concurrence. The ROD includes EPA's
9 explanations for any significant differences between the final plan and the proposed plan as well
10 as a responsiveness summary to the public comments. Notice of the final plan was published in
11 accordance with Section 117(b) of CERCLA.

12 K. The ROD concluded that the large study area, multiplicity of contaminant
13 sources, diversity of activities, and complexity of the CB/NT Site, required that response actions
14 be accomplished in seven (7) operable units managed primarily by EPA and Ecology, including
15 (1) Operable Unit 01 - CB/NT Sediments; (2) Operable Unit 02 - Asarco Tacoma Smelter; (3)
16 Operable Unit 03 - Tacoma Tar Pits; (4) Operable Unit 04 - Asarco Off-Property; (5) Operable
17 Unit 05 - CB/NT Sources; (6) Operable Unit 06 - Asarco Sediments; and (7) Operable Unit 07 -
18 Asarco demolition. EPA identified several "Problem Areas" in the ROD for further study and
19 evaluation. EPA identified two Problem Areas within the Hylebos Waterway. These are called
20 the Head of the Hylebos Waterway Problem Area and the Mouth of the Hylebos Waterway
21 Problem Area. This Consent Decree addresses Operable Unit 01 (sediments) within the portion
22 of the Hylebos Waterway known as the Mouth of the Hylebos Problem Area.

23
24 L. The ROD addresses both sediment remediation (Operable Unit 01) and source
25 control (Operable Unit 05). EPA has entered into Superfund Cooperative Agreements with the

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1 State and the Puyallup Tribe of Indians for remedial activities at the CB/NT Site. A support
2 agency Cooperative Agreement was entered into with the Puyallup Tribe. Under a Cooperative
3 Agreement with Ecology, effective May 1, 1989, and in the ROD for the CB/NT Site, EPA is
4 designated as the lead agency for remediation of contaminated sediments in the waterways and
5 Commencement Bay, and Ecology is the lead agency for source control of hazardous substances
6 from upland areas (down to the mean high tidal elevation of the waterways). EPA and Ecology
7 closely coordinate response activities pertinent to Operable Unit 01 (CB/NT Sediments) and
8 Operable Unit 05 (Source Control) to ensure successful implementation of the overall remedy for
9 the Mouth of the Hylebos Site and adjacent areas. EPA and Ecology closely coordinated with
10 each other regarding the Work required under this Consent Decree.

11 M. As described in the RI/FS for the CB/NT Site, there are nine Problem Areas of
12 contaminated sediments and numerous sources of hazardous substances contamination. The
13 ROD addressed eight of the nine Problem Areas, including the Mouth of the Hylebos and the
14 Head of the Hylebos Problem Areas. The ninth Problem Area, the Asarco Sediments, is now a
15 separate operable unit of the CB/NT Site and is the subject of a separate ROD. This Consent
16 Decree addresses remediation of the Mouth of the Hylebos Site.

17
18 N. On November 29, 1993, six entities (collectively known as the Hylebos Cleanup
19 Committee or "HCC") entered into an Administrative Order on Consent ("HCC AOC") with
20 EPA for the preparation of, performance of, and reimbursement of oversight costs for Pre-
21 remedial Design Activities for the Hylebos Waterway Problem Areas. The objectives of the
22 HCC AOC were: (1) to perform pre-remedial design work for the Hylebos Waterway consistent
23 with the ROD; (2) to perform analyses and studies needed by EPA to select a Remediation Plan,
24 including an acceptable confined disposal site and any necessary mitigation, which attains

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1 Sediment Quality Objectives identified in the ROD, and all applicable or relevant and
2 appropriate requirements; and (3) to provide for recovery by EPA of its response and oversight
3 costs incurred with respect to the implementation of the HCC AOC. By letter dated November
4 8, 2001, EPA confirmed that all activities required by the original Scope of Work to the HCC
5 AOC were performed, except remaining oversight billings, in accordance with Section XXVI of
6 the HCC AOC. A second amendment to the HCC AOC replaced the six original Respondents
7 with only ATOFINA Chemicals, Inc. and General Metals of Tacoma, Inc. and amended the
8 Scope of Work to be comprised of a Pilot Project to be conducted in the winter of 2001 and
9 2002. With the exception of cost reimbursement and record keeping activities, the Settling
10 Defendants who were parties to the HCC AOC have performed all activities required by the HCC
11 AOC.

12 O. In November of 1997, Settling Defendant Occidental Chemical Corporation,
13 through its then-existing subsidiary OCC Tacoma, Inc., entered into an Administrative Order on
14 Consent (the "Occidental AOC") with EPA for removal activities pertinent to a shoreline
15 embankment area in the Mouth of the Hylebos Waterway Site located at 605 Alexander Avenue
16 in Tacoma (and at certain adjoining property located at 709 Alexander Avenue)(the "Occidental
17 Embankment Area") and to the portion of the Mouth of Hylebos Waterway Site known as "Area
18 5106 Sediment" due to its numerical sampling designation ("Area 5106 Sediment," as defined in
19 the Occidental AOC). The Occidental AOC addressed the Occidental Embankment Area and
20 Area 5106 Sediment separately from the HCC AOC. Effective June 30, 2001, OCC Tacoma,
21 Inc. was merged into its parent and sole shareholder, Settling Defendant Occidental Chemical
22 Corporation, and Occidental Chemical Corporation assumed performance of all activities
23 required by the Occidental AOC after the merger.
24

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1 P. Settling Defendants, Occidental Chemical Corporation, Pioneer Americas LLC,
2 Mariana Properties, Inc., and the Port of Tacoma own, owned, control, or controlled property
3 within the Hylebos Waterway Problem Area and adjacent to the Hylebos Waterway Problem
4 Area which requires remedial action under the CB/NT ROD.

5 Q. On July 28, 1997, EPA issued an Explanation of Significant Difference (ESD) for
6 the CB/NT Site, in compliance with Section 117(c) of CERCLA, that explains differences in the
7 Remedial Action that significantly change, but do not fundamentally alter, the remedy selected in
8 the ROD. The 1997 ESD modified the cleanup level for remediation of marine sediments
9 contaminated with polychlorinated biphenyls (PCBs) at the CB/NT Site.

10
11 R. On August 3, 2000, EPA issued an ESD, in compliance with Section 117(c) of
12 CERCLA, that explains differences in the Remedial Action that significantly change, but do not
13 fundamentally alter, the remedy selected in the ROD. The ESD was a comprehensive document
14 addressing cleanup plans for two waterways within the CB/NT Site, selecting disposal sites for
15 all contaminated sediment yet to be dredged and confined from the CB/NT Site, as well as
16 providing performance standards and documenting other differences to the ROD. Based on the
17 studies and analysis conducted under the HCC AOC with respect to the Hylebos Waterway
18 Problem Area, the ESD provides details of: the areal extent of sediment contamination in the
19 Hylebos Waterway Problem Area and the volume of sediment that requires remediation;
20 designation of areas that are projected to naturally recover within ten (10) years of remedial
21 action if not actively remediated; EPA's decision to dispose of contaminated sediments in Blair
22 Slip 1, St. Paul Waterway, and an upland regional landfill; performance standards for mitigation
23 for the Remedial Action; and the then estimated cost of the Remedial Action at the Hylebos
24 Waterway Problem Area. Notice and public comment were taken on the ESD and notice of the

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1 final ESD was published in accordance with Section 117(c) of CERCLA. The State and the
2 Puyallup Tribe concurred on the ESD.

3
4 S. Since 1999, certain of the Settling Defendants have performed various response
5 activities (including sampling, characterization, evaluation, planning and design) pertinent to the
6 Mouth of the Hylebos Site. Such activities are described in the Statement of Work attached as
7 Appendix A, and are components of the Work required under this Consent Decree.

8 T. In order to maintain the cleanup schedule, among other reasons, on March 25,
9 2002, EPA issued a Unilateral Administrative Order for Remedial Design and Remedial Action
10 to the Settling Defendants Port of Tacoma and Occidental Chemical Corporation (EPA Docket
11 No. CERCLA 10-2002-0064)(the "Mouth UAO") and a Unilateral Administrative Order to
12 Settling Defendant Occidental Chemical Corporation (EPA Docket No. 10-2002-0066)(the
13 "Occidental UAO"). The Parties anticipated replacing each UAO with a consent decree. All
14 obligations of those Settling Defendants under the Mouth UAO are incorporated into and
15 enforceable under the terms of this Consent Decree. The Mouth UAO shall terminate upon entry
16 of this Consent Decree. The Occidental UAO is being addressed under the Occidental AOC.

17 U. This Consent Decree addresses remedial design and remedial action for the Mouth
18 of the Hylebos Waterway Problem Area, including but not limited to: construction of a nearshore
19 confined disposal slip at Slip 1 of the Blair Waterway; the filling of that nearshore confined
20 disposal facility with dredged sediment from the Mouth of the Hylebos Waterway Problem Area
21 and other locations; and implementation and long term operation, maintenance and monitoring of
22 such remedial actions. The Settling Defendants have requested that EPA approve closure of
23 Blair Slip 1 during the 2004 construction season and acknowledge that after its closure, Blair Slip
24 1 will no longer be used for disposal of Waste Materials removed from areas within the CB/NT

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1 Site, including the Occidental Site. Settling Defendants performing cleanup actions at the
2 Occidental Site agree that they will fully evaluate remedial alternatives, including the removal
3 and disposal off-site or on-site disposal of Waste Material located within the Occidental Site, as
4 established pursuant to the Occidental AOC as amended.

5
6 V. On September 15, 2003, the United States District Court for the Western District
7 of Washington entered the Cash-Out Consent Decree whereby twenty-six parties and five
8 departments, agencies and instrumentalities of the United States became obligated to make
9 certain payments to the Hylebos Waterway Problem Area Escrow Account to be used to pay for
10 portions of the remedial design and remedial action for the Hylebos Waterway Site. This
11 Consent Decree provides for distribution(s) of portions of escrow account funds to the Mouth of
12 the Hylebos Cleanup Account pursuant to the terms of the Cash-Out Consent Decree and its
13 Appendix D (Escrow Agreement) to pay for portions of the remedial design and remedial action
14 for the Mouth of the Hylebos Waterway Site.

15 W. Remedial design and remedial action for other areas of the Hylebos Waterway
16 Problem Area not addressed by this Consent Decree, referred to as the Head of the Hylebos
17 Waterway Problem Area and the Occidental Site, are being performed under separate consent
18 decrees or orders.

19
20 X. Based on the information presently available to EPA, EPA believes that the Work
21 will be properly and promptly conducted by the Settling Defendants if conducted in accordance
22 with the requirements of this Consent Decree and its appendices.
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1 Y. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action
2 selected by the ROD and the Work to be performed by the Settling Defendants shall constitute a
3 response action taken or ordered by the President.

4 Z. The Parties recognize, and the Court by entering this Consent Decree finds, that
5 this Consent Decree has been negotiated by the Parties in good faith and implementation of this
6 Consent Decree will expedite the cleanup of the Mouth of the Hylebos Waterway Site, and will
7 avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is
8 fair, reasonable, and in the public interest.

9
10 NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

11
12 II. JURISDICTION

13 1. This Court has jurisdiction over the subject matter of this action pursuant to 28
14 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has
15 personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent
16 Decree and the underlying complaint, Settling Defendants waive all objections and defenses that
17 they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall
18 not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce
19 this Consent Decree.

20
21 III. PARTIES BOUND

22 2. This Consent Decree applies to and is binding upon the United States and upon
23 Settling Defendants and their heirs, successors and assigns. Any change in ownership or
24 corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real

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1 or personal property, shall in no way alter such Settling Defendant's responsibilities under this
2 Consent Decree.

3
4 3. Settling Defendants either directly or through the Supervising Contractor shall
5 provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined
6 below) required by this Consent Decree and to each person representing any Settling Defendant
7 with respect to the Mouth of the Hylebos Site or the Work and shall condition all contracts
8 entered into hereunder upon performance of the Work in conformity with the terms of this
9 Consent Decree. Settling Defendants or their contractors shall provide written notice of the
10 Consent Decree to all subcontractors hired to perform any portion of the Work required by this
11 Consent Decree. Settling Defendants shall nonetheless be responsible for ensuring that their
12 contractors and subcontractors perform the Work contemplated herein in accordance with this
13 Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each
14 contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling
15 Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

16 IV. DEFINITIONS

17
18 4. Unless otherwise expressly provided herein, terms used in this Consent Decree
19 that are defined in CERCLA or in regulations promulgated under CERCLA shall have the
20 meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are
21 used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the
22 following definitions shall apply:

23 "Cash-Out Consent Decree" shall mean the Consent Decree in United States v. Mary
24 Anderson et al., Civil Action No. C03-5107 (W.D. WA 2003).

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1 “CB/NT Site” shall mean the Commencement Bay Nearshore/Tideflats Superfund Site,
2 encompassing approximately 10-12 square miles of shorelines, intertidal areas, bottom
3 sediments, water, and adjacent lands located in Tacoma, Washington. The upland boundaries of
4 the CB/NT Site are defined according to the contours of localized drainage basins that flow into
5 the marine waters. The marine boundary of the CB/NT Site is limited to the shoreline, intertidal
6 areas, bottom sediments, and water of depths less than 60 feet below mean lower low water. The
7 nearshore portion of the CB/NT Site is defined as the area along the Ruston shoreline from the
8 Mouth of City Waterway to Point Defiance. The tideflats portion of the CB/NT Site includes the
9 Hylebos, Blair, Sitcum, Milwaukee, St. Paul, Middle, Wheeler-Osgood, and Thea Foss
10 waterways; the Puyallup River upstream to the Interstate 5 bridge; and the adjacent land areas.
11 The CB/NT Site encompasses the Hylebos Waterway Problem Area (containing the
12 Mouth/Middle and Head of Hylebos Waterway Problem Areas).

13 “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and
14 Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.*

15
16 “Consent Decree” shall mean this Consent Decree and all appendices attached hereto
17 (listed in Section XXIX) as they may be amended in accordance with this Consent Decree. In the
18 event of conflict between this Consent Decree and any appendix, this Decree shall control.

19 “Day” shall mean a calendar day unless expressly stated to be a working day. “Working
20 day” shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any
21 period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday,
22 or Federal holiday, the period shall run until the close of business of the next working day.
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1 "Effective Date" shall be the effective date of this Consent Decree as provided in
2 Paragraph 104.

3 "EPA" shall mean the United States Environmental Protection Agency and any successor
4 departments or agencies of the United States.

5
6 "Ecology" shall mean the Washington State Department of Ecology and any successor
7 departments or agencies of the State.

8
9 "Future Oversight Costs" shall mean that portion of Future Response Costs that EPA
10 incurs in monitoring and supervising Settling Defendants' performance of the Work to determine
11 whether such performance is consistent with the requirements of this Consent Decree, including
12 costs incurred in reviewing plans, reports and other documents submitted pursuant to this
13 Consent Decree, as well as, all costs incurred in overseeing implementation of the Unilateral
14 Administrative Order for Remedial Design and Remedial Action (EPA Docket No. CERCLA 10-
15 2002-0064) that EPA issued to the Port of Tacoma, Occidental Chemical Corporation and OCC
16 Tacoma, Inc., on March 25, 2002, and costs incurred in overseeing implementation of the Work
17 in this Consent Decree; however, Future Oversight Costs do not include, *inter alia*: the costs
18 incurred in overseeing implementation of Unilateral Administrative Order for Remedial Design
19 and Remedial Action (EPA Docket No. CERCLA. 10-2002-0065) that EPA issued to Atofina
20 Chemicals, Inc., and General Metals of Tacoma, Inc., on March 25, 2002, the costs incurred in
21 overseeing implementation of Unilateral Administrative Order for Removal Activities (EPA
22 Docket No. CERCLA 10-2002-0066) that EPA issued to the Occidental Chemical Corporation
23 and OCC Tacoma, Inc., on March 25, 2002, the costs incurred by the United States pursuant to
24 Sections VII (Remedy Review), IX (Access and Institutional Controls), XV (Emergency
25 Response), and Paragraph 87 of Section XXI (Work Takeover), or the costs incurred by the

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1 United States in enforcing the terms of this Consent Decree, including all costs incurred in
2 connection with Dispute Resolution pursuant to Section XIX (Dispute Resolution) and all
3 litigation costs.

4 “Future Response Costs” shall mean all costs, including, but not limited to, direct and
5 indirect costs, that the United States incurs in reviewing or developing plans, reports and other
6 items directly related to or associated with the Mouth of the Hylebos Problem Area pursuant to
7 this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing
8 this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs,
9 laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the
10 cost of attorney time and any monies paid to secure access and/or to secure or implement
11 institutional controls including, but not limited to, the amount of just compensation), XV, and
12 Paragraph 87 of Section XXI. Future Response Costs shall also include all costs incurred in
13 overseeing implementation of the Unilateral Administrative Order for Remedial Design and
14 Remedial Action (EPA Docket No. CERCLA 10-2002-0064) that EPA issued to the Port of
15 Tacoma, Occidental Chemical Corporation and OCC Tacoma, Inc., on March 25, 2002, and shall
16 include costs incurred for bay-wide CB/NT Site work, but only if such costs are directly related
17 to or are attributed to the Mouth of the Hylebos Problem Area. Future Response Costs shall not
18 include costs incurred that relate to or are associated with the Head of the Hylebos Problem Area,
19 including the costs incurred in overseeing implementation of Unilateral Administrative Order for
20 Remedial Design and Remedial Action (EPA Docket No. CERCLA. 10-2002-0065) that EPA
21 has incurred since EPA issued that Unilateral Administrative Order to Atofina Chemicals, Inc.
22 and General Metal of Tacoma, Inc., on March 25, 2002, the costs incurred in overseeing
23 implementation of Unilateral Administrative Order for Removal Activities (EPA Docket No.

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1 CERCLA 10-2002-0066) that EPA issued to the Occidental Chemical Corporation and OCC
2 Tacoma, Inc., on March 25, 2002, or any costs associated with any fish tissue studies that are
3 conducted by EPA for long-term monitoring at the Hylebos Waterway Problem Area, or costs
4 incurred after Certification of the Remedial Action pursuant to Paragraph 47.b of this Consent
5 Decree that are incurred solely as a result of any future release or threat of release of a hazardous
6 substance, pollutant or contaminant at or in the Mouth of the Hylebos Waterway Problem Area
7 by any party other than the Settling Defendants and the Settling Defendants are not otherwise
8 potentially liable for such costs pursuant to CERCLA Section 107. The Settling Defendants shall
9 have the burden of establishing that such costs are not Future Response Costs.

10
11 "HCC AOC" shall mean the November 1993, Administrative Order on Consent for Pre-
12 Remedial Design Study, as amended, between EPA and six entities, including Settling
13 Defendants Port of Tacoma and Occidental Chemical Corporation, EPA Docket No. 1093-07-03-
14 104/122.

15 "Head of the Hylebos Waterway Problem Area" or "Head of Hylebos Site" shall mean
16 Segments 1 and 2 as designated in the Pre-Remedial Design Report submitted under the HCC
17 AOC, as reflected in figures contained in the August 2000 ESD, excluding Sediment
18 Management Areas 103 and 123.

19 "Hylebos Waterway Problem Area Escrow Account" shall mean the escrow account
20 created pursuant to Appendix D of the consent decree in United States v. Mary Anderson, et al.,
21 Civil Action No C03-5107 (W.D. WA 2003).

22
23 "Hylebos Waterway Problem Areas Special Account" shall mean the special account
24 established by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. §9622(b)(3), and

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1 created by the Consent Decree entered in U.S. v. Bay Chemical Company, et al, C99-5521 (RJB),
2 by the U.S. District Court for the Western District of Washington on June 23, 2000.

3 "Hylebos Waterway Problem Area" shall mean the entire Hylebos Waterway, including
4 but not limited to the Mouth of Hylebos Waterway Problem Area, the Head of Hylebos
5 Waterway Problem Area, and all other areas of the Hylebos Waterway, except for the Occidental
6 Site, that extends from minus 60 foot depth line in the bay to the mouth of the Hylebos Creek.
7 The Hylebos Waterway is within the Commencement Bay Nearshore/Tideflats Superfund Site,
8 encompassing approximately 285 acres, in the northern-most Waterway in Commencement Bay
9 that is bordered by Taylor Way to the south and Marine View Drive to the north in Tacoma,
10 Pierce County, Washington and depicted generally on the map attached as Appendix B.

11
12 "Interest," shall mean interest at the rate specified for interest on investments of the EPA
13 Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on
14 October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest
15 shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change
16 on October 1 of each year.

17
18 "Mouth of the Hylebos Cleanup Account" shall mean the account established by the Port
19 of Tacoma and Occidental Chemical Corporation for the purpose of paying for the work
20 associated with the Mouth of the Hylebos Problem Area.

21 "Mouth of the Hylebos Waterway Site" or "Mouth of the Hylebos Problem Area" shall
22 mean segments 3, 4, and 5 of the Hylebos Waterway Problem Area, as designated in the Pre-
23 Remedial Design Evaluation Report submitted under the HCC AOC, as reflected in figures
24 contained in the August 2000 ESD, portions of Segment 1 designated as Sediment Management

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1 Areas 103 and 123 in such Pre-Remedial Design Evaluation Report and the August 2000 ESD,
2 and the areal extent of contamination in such areas and those areas necessary to stage or
3 implement Work related to this Consent Decree. The Mouth of the Hylebos Problem Area shall
4 also include Blair Slip 1 and the area immediately adjacent to Blair Slip 1. The Mouth of the
5 Hylebos Problem Area does not include the Occidental Site. Attached to this Consent Decree as
6 Appendix C is a map that depicts the Mouth of the Hylebos Waterway Problem Area.

7
8 "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous
9 Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42
10 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

11 "NCD Site" shall mean the nearshore confined disposal site located at Slip 1 in the Blair
12 Waterway, into which contaminated sediment shall be deposited and contained for disposal in
13 accordance with this Consent Decree and the Statement of Work. The NCD Site is a part of the
14 Mouth of the Hylebos Problem Area. A description of the NCD Site and a map showing its
15 location is attached as Appendix C to this Consent Decree.

16
17 "Occidental AOC" shall mean the November 1997, Administrative Order on Consent, as
18 amended, between EPA and OCC Tacoma, Inc. (a then-existing subsidiary of Occidental
19 Chemical Corporation), EPA Docket No. 10-97-0011-CERCLA.

20 "Occidental Site" shall mean that portion of segment 5 of the Mouth of the Hylebos
21 Waterway Problem Area and those portions of the upland properties described in the next
22 sentence where Waste Material has or may come to be located as a result of releases or
23 threatened releases of Waste Material from operations related to the production, processing,
24 formulation or disposal of chemical materials or products. Accordingly, the Occidental Site shall

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1 include, but not be limited to the following: Area 5106; the Occidental Embankment Area; the
2 Pioneer Property located at 605 Alexander Avenue; locations of groundwater contaminant
3 plumes and contaminated sediments on the Port of Tacoma property located 401 Alexander
4 Avenue to the north of the Pioneer Property; locations of groundwater contaminant plumes and
5 contaminated sediments on the Mariana Properties property located at 709 Alexander Avenue
6 and the Port of Tacoma property located at 721 Alexander Avenue to the south of the Pioneer
7 Property; and other areas of Segment 5 of the Mouth of the Hylebos Waterway Problem Area
8 where releases of Waste Material from such properties have come to be located. The Occidental
9 Site does not include the release of total petroleum hydrocarbon, BTEX or other constituents of
10 concern from petroleum product storage operations currently or historically located on the 709
11 Alexander Avenue property or 721 Alexander Avenue property which has been identified in
12 shallow groundwater underlying the 709 Alexander Avenue property or the 721 Alexander
13 Avenue property and determined to be moving towards the Blair Waterway. Appendix C of this
14 Consent Decree is a map that depicts the Occidental Site.

15
16 “Operation, Maintenance & Monitoring” or “O, M & M” shall mean all activities
17 required to maintain the effectiveness of the Remedial Action as required under the Operation,
18 Maintenance and Monitoring Plan approved or developed by EPA pursuant to this Consent
19 Decree and the SOW.

20 “Paragraph” shall mean a portion of this Consent Decree identified by an arabic numeral
21 or an upper case letter.

22 “Parties” shall mean the United States and the Settling Defendants.
23
24

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1 "Performance Standards" shall mean the cleanup standards, standards of control, and
2 other substantive requirements, criteria or limitations, including Sediment Quality Objectives,
3 construction and post-construction standards, and habitat standards, set forth in the ROD, the
4 1997 ESD, the August 2000 ESD, and the SOW, and approved plans, deliverables, or reports
5 required by the SOW.

6 "Plaintiff" shall mean the United States.
7

8 "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et
9 seq. (also known as the Resource Conservation and Recovery Act).

10 "Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the
11 CB/NT Site signed on September 30, 1989, by the Regional Administrator, EPA Region 10, all
12 attachments thereto and incorporating all significant differences thereto documented in the ESD
13 issued on July 28, 1997 and the ESD issued on August 3, 2000. The 1997 ESD or the 2000 ESD
14 may be referred to or discussed individually or separately from the 1989 ROD in this Consent
15 Decree where appropriate.
16

17 "Remedial Action" shall mean those activities, except for Operation, Maintenance, and
18 Monitoring, that have been and are to be undertaken by the Settling Defendants to implement the
19 ROD, in accordance with the SOW and plans, deliverables, or reports approved by EPA and
20 required by the SOW. Remedial Action shall include monitoring of areas within the Mouth of
21 the Hylebos Problem Area identified in the SOW as natural recovery areas and, if necessary and
22 as determined by EPA, additional remedial action that may be required on such natural recovery
23 areas.
24

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1 "Remedial Action Work Plans" shall mean the documents developed pursuant to this
2 Consent Decree and SOW and approved by EPA, and any amendments thereto.

3 "Remedial Design" shall mean those activities that have been and are to be undertaken by
4 the Settling Defendants to develop the final plans and specifications for the Remedial Action
5 developed in accordance with the SOW.

6
7 "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

8 "Settling Defendants" shall mean the Port of Tacoma, Occidental Chemical Corporation,
9 Pioneer Americas LLC, and Mariana Properties, Inc.

10
11 "State" shall mean the State of Washington.

12 "Statement of Work" or "SOW" shall mean the statement of work attached to this
13 Consent Decree as Appendix A for implementation of the Remedial Design, Remedial Action,
14 and Operation, Maintenance and Monitoring at the Mouth of the Hylebos Problem Area, as
15 depicted in Appendix C to this Consent Decree and any modifications made in accordance with
16 this Consent Decree. The SOW shall include all work plans, schedules, and other tasks described
17 and required in the SOW to be approved by EPA.

18
19 "Supervising Contractor" shall mean the individuals retained by Settling Defendants and
20 identified in Paragraph 10 of this Consent Decree to supervise and direct the implementation of
21 the Work under this Consent Decree.

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1 "United States" shall mean the United States of America, including all of its departments,
2 agencies, and instrumentalities, which includes without limitation EPA and any federal natural
3 resources trustee.

4 "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of
5 CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42
6 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C.
7 § 6903(27); and (4) any "hazardous substance" under the Washington's Model Toxics Control
8 Act, Washington RCW 70.105D.

9
10 "Work" shall mean all activities Settling Defendants are required to perform under this
11 Consent Decree, and in the SOW, except those required by Section XXV (Retention of Records).

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V. GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health, welfare and the environment at the Hylebos Waterway Problem Area by the design and implementation of response actions at the Mouth of the Hylebos Problem Area by the Settling Defendants, to reimburse certain response costs of the Plaintiff, to resolve the claims of the Plaintiff which have been asserted against Settling Defendants, and to resolve certain of the claims of Settling Defendants which have been or could have been asserted against the United States with regard to the Hylebos Waterway Problem Area, except as provided in Paragraph 90 of Section XXII (Covenants of Settling Defendants), and to provide Settling Defendants with protection from contribution actions or claims asserted against Settling Defendants as provided in this Consent Decree.

6. Commitments by Settling Defendants

a. Settling Defendants shall finance and perform the Work in accordance with this Consent Decree, the ROD, the Mouth of Hylebos SOW, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Settling Defendants and approved by EPA pursuant to this Consent Decree. Settling Defendants shall also reimburse the United States for Future Response Costs as provided in this Consent Decree. This Consent Decree supersedes the Mouth UAO. All activities previously required by the Mouth UAO, including reimbursement of response costs, are incorporated into and enforceable under this Consent Decree. Upon entry of this Consent Decree, the Mouth UAO shall be terminated and be of no further force and effect.

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1 b. The obligations of Settling Defendants to finance and perform the Work
2 and to pay amounts owed the United States under this Consent Decree are joint and several. In
3 the event of the insolvency or other failure of one of the Settling Defendants to implement the
4 requirements of this Consent Decree, the remaining Settling Defendants shall complete all such
5 requirements.

6
7 7. Compliance With Applicable Law. All activities undertaken by Settling
8 Defendants pursuant to this Consent Decree shall be performed in accordance with the
9 requirements of all applicable federal and state laws and regulations. Settling Defendants must
10 also comply with all applicable or relevant and appropriate requirements of all federal and state
11 environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to
12 this Consent Decree, if approved by EPA, are consistent with the NCP.

13 8. Permits

14
15 a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the
16 NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e.,
17 within the areal extent of contamination within the CB/NT Site or in very close proximity to the
18 contamination and necessary for implementation of the Work). Where any portion of the Work
19 that is not on-site requires a federal or state permit or approval, Settling Defendants shall submit
20 timely and complete applications and take all other actions necessary to obtain all such permits or
21 approvals.

22 b. The Settling Defendants may seek relief under the provisions of Section
23 XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work
24 resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

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1 c. This Consent Decree is not, and shall not be construed to be, a permit
2 issued pursuant to any federal or state statute or regulation.

3 9. Notice to Successors-in-Title.
4

5 a. With respect to any property owned or controlled by the Settling
6 Defendants that is located within the Hylebos Waterway Problem Area, within 15 days after the
7 entry of this Consent Decree, the Settling Defendants shall submit to EPA for review and
8 approval a notice to be filed with the Recorder's Office or Registry of Deeds or other appropriate
9 office, Pierce County, State of Washington, which shall provide notice to all successors-in-title
10 that the property is part of the Hylebos Waterway Problem Area, that EPA selected a remedy for
11 the CB/NT Site on September 30, 1989, and that potentially responsible parties have entered into
12 a Consent Decree requiring implementation of the remedy in the Hylebos Waterway Problem
13 Area. Such notices shall identify the United States District Court in which the Consent Decree
14 was filed, the name and civil action number of this case, and the date the Consent Decree was
15 entered by the Court. The Settling Defendants shall record the notices within ten (10) days of
16 EPA's approval of the notices. The Settling Defendants shall provide EPA with a certified copy
17 of the recorded notices within 10 days of recording such notices.

18 b. At least thirty (30) days prior to the conveyance of any interest in property
19 located within the Mouth of the Hylebos Waterway Problem Area including, but not limited to,
20 fee interests, and leasehold interests, the Settling Defendants conveying the interest shall give
21 the grantee written notice of (i) this Consent Decree, and (ii) any recorded restrictive covenant
22 authorized by Wash. RCW 70.105D.030(1)(f) and (g), and more specifically described in
23 Washington Administrative Code (WAC) 173-340-440 that places use restrictions on and
24

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1 concerning the real property as more fully described in Section IX of this Consent Decree. At
2 least thirty (30) days prior to such conveyance, the Settling Defendants conveying the interest
3 shall also give written notice to EPA and the State of the proposed conveyance, including the
4 name and address of the grantee, and the date on which notice of the Consent Decree, access
5 easements, and/or restrictive easements or covenants was given to the grantee.

6
7 c. In the event of any such conveyance, the Settling Defendants' obligations
8 under this Consent Decree, including, but not limited to, its obligation to perform the Work
9 under Section VI of this Consent Decree and the SOW, provide or secure access and institutional
10 controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and
11 Institutional Controls) of this Consent Decree, shall continue to be met by the Settling
12 Defendant(s). In no event shall the conveyance release or otherwise affect the liability of the
13 Settling Defendants to comply with all provisions of this Consent Decree, absent the prior
14 written consent of EPA. If the United States approves, the grantee may perform some or all of
15 the Work under this Consent Decree.

16 d. The notice obligations under this section shall terminate upon certification
17 of completion of the Work, in accordance with Section XIV (Certification of Completion) of the
18 Consent Decree, except to the extent that the property is subject to ongoing institutional controls
19 pursuant to Section IX (Access and Institutional Controls) of this Consent Decree.

20
21 VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS

22 10. Selection of Supervising Contractor.
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24

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1 a. All aspects of the Work to be performed by Settling Defendants pursuant
2 to Sections VI (Performance of the Work by Settling Defendants), VII (Remedy Review), VIII
3 (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this
4 Consent Decree shall be under the direction and supervision of the Supervising Contractors,
5 Suzanne Dudziak and Allen Meek, who have not been disapproved by EPA. If at any time,
6 Settling Defendants propose to change its Supervising Contractor, Settling Defendants shall
7 notify EPA in writing of the name, title, and qualifications of any contractor proposed to be the
8 Supervising Contractor and must obtain an authorization to proceed from EPA before the new
9 Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.
10 The selection of a new Supervising Contractor shall be subject to disapproval by EPA. An EPA
11 decision to disapprove a Supervising Contractor shall be subject to the dispute resolution
12 proceedings of Paragraph 67 (record review) of this Consent Decree. With respect to any
13 contractor proposed to be Supervising Contractor, Settling Defendants shall demonstrate that the
14 contractor has a quality system that complies the requirements of the SOW. The Supervising
15 Contractors mentioned above, have made the required demonstration.

16
17 b. If EPA disapproves a proposed Supervising Contractor, EPA will notify
18 Settling Defendants in writing. Settling Defendants shall submit to EPA a list of additional
19 contractors, including the qualifications of each contractor, that would be acceptable to them
20 within 30 days of receipt of EPA's disapproval of the contractor previously proposed. EPA will
21 provide written notice of the names of any contractor(s) that it disapproves and an authorization
22 to proceed with respect to any of the other contractors. Settling Defendants may select any
23 contractor from that list that is not disapproved and shall notify EPA of the name of the
24 contractor selected within 21 days of EPA's authorization to proceed.

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1 c. If EPA fails to provide written notice of its authorization to proceed or
2 disapproval as provided in this Paragraph and if this failure prevents the Settling Defendants
3 from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent
4 Decree, Settling Defendants may seek relief under the provisions of Section XVIII (Force
5 Majeure).

6
7 11. Remedial Design and Remedial Action.

8 a. Settling Defendants shall perform the Remedial Design and Remedial
9 Action activities as described in the SOW and in accordance with the schedule set forth in the
10 SOW. The SOW is attached to this Consent Decree as Appendix A and by this reference is
11 incorporated into this Consent Decree. The schedules and deliverables (work plans, reports, and
12 other documents) set forth in the SOW have been or shall be submitted to EPA for review and
13 approval pursuant to Section XI (EPA Approval of Plans and Other Submissions) and once
14 approved by EPA shall be enforceable under the terms of this Consent Decree.

15 b. The Settling Defendants shall continue to implement Remedial Action
16 until certification of completion of Remedial Action in accordance with Section XIV
17 (Certification of Completion) of this Consent Decree. The Settling Defendants shall continue to
18 implement the Work until certification of completion of the Work in accordance with Section
19 XIV (Certification of Completion) of this Consent Decree.

20
21 12. Modification of the SOW or Related Work Plans.

22 a. If EPA determines that modification to the work specified in the Mouth of
23 the Hylebos SOW and/or in work plans developed pursuant to the SOW is necessary to achieve
24

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1 and maintain the Performance Standards or to carry out and maintain the effectiveness of the
2 remedy set forth in the ROD, EPA may require that such modification be incorporated in the
3 Mouth of the Hylebos SOW and/or such work plans. Provided, however, that a modification
4 may only be required pursuant to this Paragraph to the extent that it is consistent with the scope
5 of the remedy selected in the ROD.

6
7 b. For the purposes of Paragraphs 12, 47.b., and 48 only, the "scope of the
8 remedy selected in the ROD" shall mean the following:

9 remediation of contaminated marine sediment in the Mouth of the Hylebos Waterway
10 Problem Area by implementing and maintaining the following key elements of the
11 selected remedy: site use restrictions, natural recovery, enhanced natural recovery,
12 sediment remedial action, and monitoring. These key elements are more fully described
13 in Section 10 of the September 30, 1989 ROD and the SOW and include achieving
14 Performance Standards as defined in this Consent Decree.

15
16 c. If Settling Defendants object to any modification determined by EPA to be
17 necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX
18 (Dispute Resolution), Paragraph 67 (record review). The Mouth of the Hylebos SOW and/or
19 related work plans shall be modified in accordance with final resolution of the dispute.

20 d. Settling Defendants shall implement any work required by any
21 modifications incorporated in the Mouth of the Hylebos SOW and/or in work plans developed
22 pursuant to the SOW in accordance with this Paragraph.

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1 e. Nothing in this Paragraph shall be construed to limit EPA's authority to
2 require performance of further response actions as otherwise provided in this Consent Decree.

3
4 13. Settling Defendants acknowledge and agree that nothing in this Consent Decree,
5 or the SOW and/or related work plans, including the Remedial Designs, the Remedial Action
6 Work Plans and the Operations, Maintenance and Monitoring Plan, constitutes a warranty or
7 representation of any kind by Plaintiff that compliance with the work requirements set forth in
8 the SOW and/or related work plans, including the Remedial Designs, the Remedial Action
9 Work Plans and the Operations, Maintenance and Monitoring Plan, will achieve the Performance
10 Standards.

11 14. a. Settling Defendants shall, prior to any off-Site shipment of Waste Material
12 from the Mouth of the Hylebos Problem Area to an out-of-state waste management facility,
13 provide written notification to the appropriate state environmental official in the receiving
14 facility's state and to the EPA Project Coordinator, identified in Section XII of this Consent
15 Decree, of such shipment of Waste Material. However, this notification requirement shall not
16 apply to any off-Site shipments when the total volume of all such shipments will not exceed 10
17 cubic yards.

18
19 (1) The Settling Defendants shall include in the written notification the
20 following information, where available: (1) the name and location of the facility to which the
21 Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped;
22 (3) the expected schedule for the shipment of the Waste Material; and (4) the method of
23 transportation. The Settling Defendants shall notify the state in which the planned receiving
24

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1 facility is located of major changes in the shipment plan, such as a decision to ship the Waste
2 Material to another facility within the same state, or to a facility in another state.

3
4 (2) The identity of the receiving facility and state will be determined
5 by the Settling Defendants following the award of the contract for Remedial Action construction.
6 The Settling Defendants shall provide the information required by Paragraph 14.a. as soon as
7 practicable after the award of the contract and before the Waste Material is actually shipped.

8 b. Before shipping any hazardous substances, pollutants, or
9 contaminants from the CB/NT Site to an off-site location, Settling Defendants shall obtain EPA's
10 certification that the proposed receiving facility is operating in compliance with the requirements
11 of CERCLA Section 121(d)(3) and 40 C.F.R. 300.440. Settling Defendants shall only send
12 hazardous substances, pollutants, or contaminants from the CB/NT Site to an off-site facility that
13 complies with the requirements of the statutory provision and regulations cited in the preceding
14 sentence.

15 VII. REMEDY REVIEW

16
17 15. Periodic Review. Settling Defendants shall conduct any studies and
18 investigations concerning and related to the Mouth of the Hylebos Waterway Problem Area as
19 requested by EPA, in order to permit EPA to conduct reviews of whether the Remedial Action at
20 the Hylebos Waterway Problem Area is protective of human health and the environment at least
21 every five years as required by Section 121(c) of CERCLA and any applicable regulations.

22
23 16. EPA Selection of Further Response Actions. If EPA determines, at any time, that
24 the Remedial Action at the Hylebos Waterway Problem Area is not protective of human health

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1 and the environment, EPA may select further response actions for the Hylebos Waterway
2 Problem Area in accordance with the requirements of CERCLA and the NCP.

3
4 17. Opportunity To Comment. Settling Defendants and, if required by Sections
5 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on
6 any further response actions proposed by EPA as a result of the review conducted pursuant to
7 Section 121(c) of CERCLA and to submit written comments for the record during the comment
8 period.

9 18. Settling Defendants' Obligation To Perform Further Response Actions. If EPA
10 selects further response actions for the Mouth of the Hylebos Problem Area pursuant to
11 Paragraph 16, the Settling Defendants shall undertake such further response actions to the extent
12 that the reopener conditions in Paragraph 83 or Paragraph 84 (United States' reservations of
13 liability based on unknown conditions or new information) are satisfied. Settling Defendants
14 may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's
15 determination that the reopener conditions of Paragraph 83 or Paragraph 84 of Section XXI
16 (Covenants Not To Sue by Plaintiff) are satisfied, (2) EPA's determination that the Remedial
17 Action for the Mouth of the Hylebos Problem Area is not protective of human health and the
18 environment, or (3) EPA's selection of the further response actions in the Mouth of the Hylebos
19 Problem Area. Disputes pertaining to whether the Remedial Action is protective or to EPA's
20 selection of further response actions shall be resolved pursuant to Paragraph 67 (record review).
21 Settling Defendants' obligations to perform further response actions under this Paragraph do not
22 pertain to releases or the potential threat of a release of a hazardous substance, pollutant or
23 contaminant that occurs after certification of completion of the Remedial Action as described in
24 Paragraph 47.b. if such release or threat of release is solely caused by a party or parties other than

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1 the Settling Defendants and the Settling Defendants are not otherwise potentially liable under
2 CERCLA Section 107 for such release or potential threat of a release of a hazardous substance.

3
4 19. Submissions of Plans. If Settling Defendants are required to perform the further
5 response actions pursuant to Paragraph 18, they shall submit a plan for such work to EPA for
6 approval in accordance with the procedures set forth in Section VI (Performance of the Work by
7 Settling Defendants) and shall implement the plan approved by EPA in accordance with the
8 provisions of this Decree.

9
10 VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

11 20. Settling Defendants shall use quality assurance, quality control, and chain of
12 custody procedures for all samples taken under the SOW and this Consent Decree in accordance
13 with the quality assurance provisions set forth in the SOW. If relevant to the proceeding, the
14 Parties agree that validated sampling data generated in accordance with the Quality Assurance
15 Project Plan(s) (QAPP(s)) and reviewed and approved by EPA shall be admissible as evidence,
16 without objection, in any proceeding under this Decree. Settling Defendants shall ensure that
17 EPA and State personnel and their authorized representatives are allowed access at reasonable
18 times to all laboratories utilized by Settling Defendants in implementing this Consent Decree. In
19 addition, Settling Defendants shall ensure that such laboratories shall analyze all samples
20 submitted by EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendants
21 shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this
22 Consent Decree perform all analyses according to accepted EPA methods. Accepted EPA
23 methods consist of those methods which are documented in the "Contract Lab Program
24 Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work

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1 for Organic Analysis," dated February 1988, and any amendments made thereto during the course
2 of the implementation of this Decree; however, upon approval by EPA, the Settling Defendants
3 may use other analytical methods which are as stringent as or more stringent than the CLP-
4 approved methods. Settling Defendants shall ensure that all laboratories they use for analysis of
5 samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC
6 program. Settling Defendants shall only use laboratories that have a documented Quality System
7 which complies with the provisions set forth in the SOW. EPA may consider laboratories
8 accredited under the National Environmental Laboratory Accreditation Program (NELAP) as
9 meeting the Quality System requirements. Settling Defendants shall ensure that all field
10 methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will
11 be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

12
13 21. Upon request, the Settling Defendants shall allow split or duplicate samples to be
14 taken by EPA or its authorized representatives. Settling Defendants shall notify EPA not less
15 than fourteen (14) days in advance of any sample collection activity unless shorter notice is
16 agreed to by EPA. In addition, EPA shall have the right to take any additional samples that EPA
17 deems necessary. Upon request, EPA shall allow the Settling Defendants to take split or
18 duplicate samples of any samples it takes as part of the Plaintiff's oversight of the Settling
19 Defendants' implementation of the Work.

20 22. Settling Defendants shall submit to EPA four (4) copies of the results of all
21 sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendants
22 with respect to the Mouth of the Hylebos Waterway Site and/or the implementation of this
23 Consent Decree unless EPA agrees otherwise.

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1 23. Notwithstanding any provision of this Consent Decree, the United States hereby
2 retains all of its information gathering and inspection authorities and rights, including
3 enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or
4 regulations.

5
6 IX. ACCESS AND INSTITUTIONAL CONTROLS

7 24. If the Hylebos Waterway Problem Area, or any other property where access and/or
8 land/water use restrictions are needed to implement this Consent Decree or other response
9 actions being taken under another Consent Decree or Order by EPA related to the Hylebos
10 Waterway Problem Area, is owned or controlled by any of the Settling Defendants, such Settling
11 Defendants shall:

12 a. commencing on the date of lodging of this Consent Decree, provide the
13 United States and the State and their representatives, including EPA and its contractors, and any
14 other parties and their contractors performing response actions under the direction and
15 supervision of EPA within the Hylebos Waterway Problem Area with access at all reasonable
16 times to the property within the Hylebos Waterway Problem Area and the Occidental Site, or
17 such other property, for the purpose of conducting any activity related to this Consent Decree or
18 other response actions being taken under another Consent Decree or Order by EPA in the
19 Hylebos Waterway Problem Area or Occidental Site including, but not limited to, the following
20 activities:

21
22 (1) Monitoring the Work under this Consent Decree and other
23 response actions being taken under any other Consent Decree or Order;

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1 (2) Verifying any data or information submitted to the United States or
2 the State;

3 (3) Conducting investigations relating to contamination at or near the
4 Hylebos Waterway Problem Area;

5
6 (4) Obtaining samples;

7 (5) Assessing the need for, planning, or implementing additional
8 response actions at or near the Hylebos Waterway Problem Area;

9
10 (6) Implementing the Work pursuant to the conditions set forth in
11 Paragraph 87 of this Consent Decree, remedial action and operation maintenance and
12 monitoring at the Head of the Hylebos Waterway Problem Area, and response actions at
13 the Occidental Site;

14 (7) Inspecting and copying records, operating logs, contracts, or other
15 documents related to the Work maintained or generated by Settling Defendants or their
16 agents, consistent with Section XXIV (Access to Information);

17
18 (8) Assessing Settling Defendants' compliance with this Consent
19 Decree;

20 (9) Determining whether the Hylebos Waterway Problem Area or
21 other property is being used in a manner that is prohibited or restricted, or that may need
22 to be prohibited or restricted, by or pursuant to this Consent Decree or another Consent
23 Decree or order by EPA related to the Hylebos Waterway Problem Area; and
24

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1 (10) Assessing implementation of quality assurance and quality control
2 practices as defined in the approved Quality Assurance Project Plans.

3 b. commencing on the date of lodging of this Consent Decree, refrain from
4 using such property owned or controlled by Settling Defendants, in any manner that would
5 interfere with or adversely affect the implementation, integrity or protectiveness of the remedial
6 measures to be implemented pursuant to this Consent Decree, or another Consent Decree, or
7 Order by EPA in the Hylebos Waterway Problem Area so as to achieve the following
8 institutional control objectives to: prevent exposure of marine organisms to contaminated
9 sediments disposed of and confined in aquatic disposal sites or confined by capping; and/or
10 prevent exposure to marine organisms to contaminated sediments left in place in the Hylebos
11 Waterway.

12
13 c. at EPA's request, execute and record in the Auditor's Office or Registry of
14 Deeds or other appropriate land records office of Pierce County, State of Washington, an
15 easement and/or restrictive covenant authorized by the Washington Model Toxics Control Act
16 (MTCA) (MTCA Covenant) and that complies with the form and content contained in WAC
17 173-340-440 for provision of access for the purpose of conducting any activity related to this
18 Consent Decree or another Consent Decree or Order by EPA relating to the Hylebos Waterway
19 Problem Area or Occidental Site and for implementation of institutional controls that are
20 required to assure continued protection of human health and the environment or the integrity of
21 the remedial action by meeting the institutional control objectives identified in Paragraph 24.b, or
22 or another Consent Decree or Order by EPA relating to the Hylebos Waterway Problem Area or
23 Occidental Site including, but not limited to, those listed in Paragraphs 24.a and 24.b of this
24 Consent Decree. Within thirty (30) days of EPA's request, Settling Defendants shall submit a

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1 draft MTCA Covenant to EPA for approval. Settling Defendants shall execute and record the
2 EPA-approved MTCA Covenant within ten (10) days of its approval.

3
4 d. In the event that EPA and/or its authorized representatives or its
5 contractors requires access to Port of Tacoma property or the Pioneer property located at 605
6 Alexander Avenue for the purposes described in Paragraph 24(a) of this Consent Decree, the Port
7 of Tacoma or the Pioneer shall provide EPA and/or its authorized representatives or contractors
8 with access to its property upon a showing of appropriate identification by EPA and/or its
9 authorized representatives or its contractors.

10 25. If the Mouth of the Hylebos Problem Area, or any other property where access
11 and/or land/water use restrictions are needed to implement this Consent Decree, is owned or
12 controlled by persons other than any of the Settling Defendants, Settling Defendants shall use
13 best efforts to secure from such persons:

14 a. an agreement to provide access thereto for Settling Defendants, as well as
15 for the United States on behalf of EPA, and the State, as well as their representatives (including
16 contractors), for the purpose of conducting any activity related to this Consent Decree including,
17 but not limited to, those activities listed in Paragraphs 9 and 24.a. of this Consent Decree;
18

19 b. an agreement, enforceable by the Settling Defendants and the United
20 States, to refrain from using the Mouth of the Hylebos Problem Area, or such other property, in
21 any manner that would interfere with or adversely affect the implementation, integrity, or
22 protectiveness of the remedial measures to be performed pursuant to this Consent Decree and to
23 abide by the obligations and objectives established by Paragraph 24.b. of this Consent Decree;
24 and

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1 c. if EPA requests, a MTCA Covenant for provision of access and
2 implementation of institutional controls that are required to assure continued protection of human
3 health and the environment or the integrity of the remedial action. Within thirty (30) days of
4 EPA's request, Settling Defendants shall submit a draft MTCA Covenant to EPA for approval.
5 Settling Defendants shall execute and record the EPA approved MTCA Covenant within ten (10)
6 days of its approval.

7
8 26. For purposes of Paragraph 25 of this Consent Decree, "best efforts" includes the
9 payment of reasonable sums of money in consideration of access and/or restrictive covenants,
10 unless the owner is a potentially responsible party for the Hylebos Waterway Problem Area. If
11 any access agreements required by Paragraphs 25.a. of this Consent Decree are not obtained
12 within forty-five (45) days of the date of entry of this Consent Decree, or any access easements
13 or restrictive covenants required by Paragraph 25.c. of this Consent Decree are not submitted to
14 EPA in draft form within forty-five (45) days from EPA's request, Settling Defendants shall
15 promptly notify the United States in writing, and shall include in that notification a summary of
16 the steps that Settling Defendants have taken to attempt to comply with Paragraph 25 of this
17 Consent Decree. The United States may, as it deems appropriate, assist Settling Defendants in
18 obtaining access or land/water use restrictions, either in the form of contractual agreements or in
19 the form of easements running with the land. Settling Defendants shall reimburse the United
20 States in accordance with the procedures in Section XVI (Reimbursement of Response Costs),
21 for all costs incurred, direct or indirect, by the United States in obtaining such access and/or
22 land/water use restrictions including, but not limited to, the cost of attorney time and the amount
23 of monetary consideration paid or just compensation.

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27. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall cooperate with EPA's efforts to secure such governmental controls by at a minimum: not contesting any proposed law, regulation, ordinance, or other proposed governmental control; supplying data or any other information generated and/or required by the SOW; or attending meetings in accordance with Section XXIV of this Consent Decree.

28. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, or the MTCA, RCW 70.105D, and any other applicable statute or regulations.

X. REPORTING REQUIREMENTS

29. In addition to any other requirement of this Consent Decree, Settling Defendants shall submit to EPA four (4) copies of written monthly progress reports that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendants or their contractors or agents in the previous month; (c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next six weeks and provide other information relating to the progress of construction, including, but

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1 not limited to, critical path diagrams, Gantt charts or Pert charts; (e) include information
2 regarding percentage of completion, unresolved delays encountered or anticipated that may affect
3 the future schedule for implementation of the Work, and a description of efforts made to mitigate
4 those delays or anticipated delays; (f) include any modifications to the work plans or other
5 schedules that Settling Defendants have proposed to EPA or that have been approved by EPA;
6 and (g) describe all activities undertaken in support of the Community Relations Plan during the
7 previous month and those to be undertaken in the next six weeks. Settling Defendants shall
8 submit these progress reports to EPA and the State by the tenth day of every month following the
9 lodging of this Consent Decree until EPA notifies the Settling Defendants pursuant to Paragraph
10 48 of Section XIV (Certification of Completion) or until EPA approves a different schedule. If
11 requested by EPA, Settling Defendants shall also provide briefings for EPA to discuss the
12 progress of the Work.

13
14 30. The Settling Defendants shall notify EPA of any change in the schedule described
15 in the monthly progress report for the performance of any activity, including, but not limited to,
16 data collection and implementation of work plans, no later than seven days prior to the
17 performance of the activity.

18 31. Upon the occurrence of any event during performance of the Work that Settling
19 Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the
20 Emergency Planning and Community Right-to-know Act (EPCRA), Settling Defendants shall
21 within twenty-four (24) hours of the onset of such event orally notify the EPA Project
22 Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the
23 EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate
24 EPA Project Coordinator is available, the Emergency Response Section, Region 10, United

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1 States Environmental Protection Agency. These reporting requirements are in addition to the
2 reporting required by CERCLA Section 103 or EPCRA Section 304.

3
4 32. Within twenty (20) days of the onset of such an event, Settling Defendants shall
5 furnish to Plaintiff a written report, signed by the Settling Defendants' Project Coordinator,
6 setting forth the events which occurred and the measures taken, and to be taken, in response
7 thereto. Within thirty (30) days of the conclusion of such an event, Settling Defendants shall
8 submit a report setting forth all actions taken in response thereto.

9 33. Settling Defendants shall submit four (4) copies of all plans, reports, and data
10 required by the SOW or any other approved work plans to EPA in accordance with the schedules
11 set forth in such plans. Settling Defendants shall simultaneously submit one (1) copy of all such
12 plans, reports and data to the State and one (1) copy to NOAA on behalf of the Natural Resource
13 Trustees. Upon request by EPA, Settling Defendants shall submit in electronic form all portions
14 of any report or other deliverable Settling Defendants are required to submit pursuant to the
15 provisions of this Consent Decree.

16
17 34. All reports and other documents submitted by Settling Defendants to EPA (other
18 than the monthly progress reports referred to above) which purport to document Settling
19 Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized
20 representative of the Settling Defendants, including the Supervising Contractor.

21 XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

22
23 35. After review of any plan, report or other item which is required to be submitted
24 for approval pursuant to this Consent Decree, EPA shall: (a) approve, in whole or in part, the

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1 submission; (b) approve the submission upon specified conditions; (c) modify the submission to
2 cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the
3 Settling Defendants modify the submission; or (e) any combination of the above. However, EPA
4 shall not modify a submission without first providing Settling Defendants at least one notice of
5 deficiency and an opportunity to cure within thirty (30) days, except where to do so would cause
6 serious disruption to the Work or where previous submission(s) have been disapproved due to
7 material defects and the deficiencies in the submission under consideration indicate a bad faith
8 lack of effort to submit an acceptable deliverable.

9
10 36. In the event of approval, approval upon conditions, or modification by EPA,
11 pursuant to Paragraph 35(a), (b), or (c), Settling Defendants shall proceed to take any action
12 required by the plan, report, or other item, as approved or modified by EPA subject only to their
13 right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution)
14 with respect to the modifications or conditions made by EPA. In the event that the Settling
15 Defendants fail to cure within thirty (30) days, and EPA modifies the submission to cure the
16 deficiencies pursuant to Paragraph 35(c) and the submission has a material defect, EPA retains its
17 right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

18 37. Resubmission of Plans.

19
20 a. Upon receipt of a notice of disapproval pursuant to Paragraph 35(d),
21 Settling Defendants shall, within 30 days or such longer time as agreed to by EPA due to the
22 magnitude of the comments in such notice, correct the deficiencies and resubmit the plan, report,
23 or other item for approval. Any stipulated penalties applicable to the submission, as provided in
24 Section XX, shall accrue during the 30 day period or otherwise specified period but shall not be

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1 payable unless the resubmission is disapproved or modified due to a material defect as provided
2 in Paragraph 38 and 39. No stipulated penalties applicable to the submission, as provided in
3 Section XX, shall accrue during the first 30-day correction period or other agreed upon correction
4 period.

5
6 b. Notwithstanding the receipt of a notice of disapproval pursuant to
7 Paragraph 35(d), Settling Defendants shall proceed, at the direction of EPA, to take any action
8 required by any non-deficient portion of the submission. Implementation of any non-deficient
9 portion of a submission shall not relieve Settling Defendants of any liability for stipulated
10 penalties under Section XX (Stipulated Penalties) related to the deficiencies.

11 38. In the event that a resubmitted plan, report or other item, or portion thereof, is
12 disapproved by EPA, EPA may again require the Settling Defendants to correct the deficiencies,
13 in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the
14 plan, report or other item. Settling Defendants shall implement any such plan, report, or item as
15 modified or developed by EPA, subject only to their right to invoke the procedures set forth in
16 Section XIX (Dispute Resolution).

17 39. If upon resubmission, a plan, report, or item is disapproved or modified by EPA
18 due to a material defect, Settling Defendants shall be deemed to have failed to submit such plan,
19 report, or item timely and adequately unless the Settling Defendants invoke the dispute resolution
20 procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned
21 pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX
22 (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of
23 any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is
24

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upheld, stipulated penalties shall accrue for such violation from the date on which the original submission was originally required, as provided in Section XX.

40. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

XII. PROJECT COORDINATORS

41. The Settling Defendants' designated Project Coordinators are Suzanne Dudziak and Allen Meek and EPA's designated Project Coordinator is Jonathan Williams. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least five (5) working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. Unless already reviewed and not disapproved by EPA, within five (5) days of the Effective Date of this Consent Decree, the Settling Defendants shall notify EPA of its proposed Project Coordinator who shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendants' Project Coordinator shall not be an attorney for any of the Settling Defendants in this matter. He or she may assign other representatives, including other contractors, to serve as a Mouth of the Hylebos Site representative for oversight of performance of daily operations during remedial activities.

42. Plaintiff may designate other representatives, including, but not limited to, EPA employees, and federal contractors and consultants, to observe and monitor the progress of any

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1 activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate
2 Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager
3 (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part
4 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have
5 authority, consistent with the National Contingency Plan, to halt any Work required by this
6 Consent Decree and to take any necessary response action when s/he determines that conditions
7 at the Mouth of the Hylebos Problem Area constitute an emergency situation or may present an
8 immediate threat to public health or welfare or the environment due to release or threatened
9 release of Waste Material.

10
11 XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

12 43. Within thirty (30) days of entry of this Consent Decree, Settling Defendants shall
13 together establish and maintain financial security in the amount of \$36.5 Million in one or more
14 of the following forms:

- 15 a. A surety bond guaranteeing performance of the Work;
16
17 b. One or more irrevocable letters of credit equaling the total estimated cost
18 of the Work;
19
20 c. A trust fund;
21
22 d. A guarantee to perform the Work by one or more parent corporations or
23 subsidiaries, or by one or more unrelated corporations that have a substantial business
24 relationship with at least one of the Settling Defendants; or

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1 e. A demonstration that one or more of the Settling Defendants satisfy the
2 requirements of 40 C.F.R. Part 264.143(f).

3 44. If the Settling Defendants seek to demonstrate the ability to complete the Work
4 through a guarantee by a third party pursuant to Paragraph 43 of this Consent Decree, Settling
5 Defendants shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part
6 264.143(f). If Settling Defendants seek to demonstrate their ability to complete the Work by
7 means of the financial test or the corporate guarantee pursuant to Paragraph 43.d. or 43.e., they
8 shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f)
9 annually, on the anniversary of the Effective Date. In the event that EPA determines at any time
10 that the financial assurances provided pursuant to this Section are inadequate, Settling
11 Defendants shall, within 30 days of receipt of notice of EPA's determination, obtain and present
12 to EPA for approval one of the other forms of financial assurance listed in Paragraph 43 of this
13 Consent Decree. Settling Defendants' inability to demonstrate financial ability to complete the
14 Work shall not excuse performance of any activities required under this Consent Decree.

15
16 45. If Settling Defendants can show that the estimated cost to complete the remaining
17 Work has diminished below the amount set forth in Paragraph 43 above after entry of this
18 Consent Decree, Settling Defendants may, on any anniversary date of entry of this Consent
19 Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security
20 provided under this Section to the estimated cost of the remaining work to be performed.
21 Settling Defendants shall submit a proposal for such reduction to EPA, in accordance with the
22 requirements of this Section, and may reduce the amount of the security upon approval by EPA.
23 In the event of a dispute, Settling Defendants may reduce the amount of the security in
24 accordance with the final administrative or judicial decision resolving the dispute.

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46. Settling Defendants may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Settling Defendants may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

XIV. CERTIFICATION OF COMPLETION

47. a. Completion of the Remedial Action Construction.

(1) Within thirty (30) days after Settling Defendants conclude that the Remedial Action construction, including construction of any required mitigation, has been fully performed but before all the Performance Standards have been attained, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants and EPA. If, after the pre-certification inspection(s), the Settling Defendants still believe that the Remedial Action construction has been fully performed, they shall submit a written Remedial Action Construction Report requesting certification to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions) within thirty (30) days of the inspection. In the report, a registered professional engineer and the Settling Defendants' Project Coordinator shall state that the Remedial Action construction has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer and other supporting documentation to demonstrate the Construction Quality Assurance Plan ("CQAP") required by the SOW was followed. The report shall contain the following statement, signed by a responsible corporate official of a Settling Defendant or the Settling Defendants' Project Coordinator:

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1 To the best of my knowledge, after thorough investigation, I certify that the
2 information contained in or accompanying this submission is true, accurate and
3 complete. I am aware that there are significant penalties for submitting false
violations.

4 If, after completion of the pre-certification construction inspection and receipt and review of the
5 written report, EPA, after reasonable opportunity to review and comment by the State,
6 determines that the Remedial Action construction or any portion thereof has not been completed
7 in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the
8 activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to
9 complete the Remedial Action construction. EPA will set forth in the notice a schedule for
10 performance of such activities consistent with the Consent Decree or require the Settling
11 Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of
12 Plans and Other Submissions). Settling Defendants shall perform all activities described in the
13 notice in accordance with the specifications and schedules established pursuant to this Paragraph,
14 subject to their right to invoke the dispute resolution procedures set forth in Section XIX
15 (Dispute Resolution).

16 (2) If EPA concludes, based on the initial or any subsequent report
17 requesting Certification of Remedial Action Construction Completion and after a reasonable
18 opportunity for review and comment by the State, that the Remedial Action construction has
19 been performed in accordance with this Consent Decree, EPA will so certify in writing to
20 Settling Defendants. Certification of Completion of the Remedial Action construction shall not
21 affect Settling Defendants' obligations under this Consent Decree.

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1 b. Completion of Remedial Action.

2 (1) Within thirty (30) days after Settling Defendants conclude that the
3 Remedial Action has been fully performed and all the Performance Standards have been attained
4 (e.g., natural recovery and full functioning of mitigation), Settling Defendants shall schedule and
5 conduct a pre-certification inspection to be attended by Settling Defendants and EPA. If, after
6 the pre-certification inspection(s), the Settling Defendants still believe that the Remedial Action
7 has been fully performed and the Performance Standards have been attained, they shall submit a
8 written Remedial Action Completion Report requesting certification to EPA for approval
9 pursuant to Section XI (EPA Approval of Plans and Other Submissions) within thirty (30) days
10 of the inspection. In the report, a registered professional engineer and the Settling Defendants'
11 Project Coordinator shall state that the Remedial Action has been completed in full satisfaction
12 of the requirements of this Consent Decree. The written report shall include as-built drawings
13 signed and stamped by a professional engineer and other supporting documentation to
14 demonstrate the CQAP was followed. The report shall contain the following statement, signed
15 by a responsible corporate official of a Settling Defendant or the Settling Defendants' Project
16 Coordinator:
17

18 To the best of my knowledge, after thorough investigation, I certify that the
19 information contained in or accompanying this submission is true, accurate and
20 complete. I am aware that there are significant penalties for submitting false
information, including the possibility of fine and imprisonment for knowing
violations.

21 If, after completion of the pre-certification inspection and receipt and review of the written
22 report, EPA, after reasonable opportunity to review and comment by the State, determines that
23 the Remedial Action or any portion thereof has not been completed in accordance with this
24 Consent Decree or that the Performance Standards have not been achieved, EPA will notify

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1 Settling Defendants in writing of the activities that must be undertaken by Settling Defendants
2 pursuant to this Consent Decree to complete the Remedial Action and achieve the Performance
3 Standards. Provided, however, that EPA may only require Settling Defendants to perform such
4 activities pursuant to this Paragraph to the extent that such activities are consistent with the
5 "scope of the remedy selected in the ROD," as that term is defined in Paragraph 12.b. EPA will
6 set forth in the notice a schedule for performance of such activities consistent with the Consent
7 Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval
8 pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants
9 shall perform all activities described in the notice in accordance with the specifications and
10 schedules established pursuant to this Paragraph, subject to their right to invoke the dispute
11 resolution procedures set forth in Section XIX (Dispute Resolution).

12
13 (2) If EPA concludes, based on the initial or any subsequent report
14 requesting Certification of Remedial Action Completion and after a reasonable opportunity for
15 review and comment by the State, that the Remedial Action has been performed in accordance
16 with this Consent Decree and that the Performance Standards have been achieved, EPA will so
17 certify in writing to Settling Defendants. This certification shall constitute the Certification of
18 Completion of the Remedial Action for purposes of this Consent Decree, including, but not
19 limited to, Section XXI (Covenants Not to Sue by Plaintiff). Certification of Completion of the
20 Remedial Action shall not affect Settling Defendants' obligations under this Consent Decree.

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1 48. Completion of the Work.

2 a. Within thirty (30) days after Settling Defendants conclude that all phases
3 of the Work described in consistent with the SOW and this Consent Decree, have been fully
4 performed, Settling Defendants shall schedule and conduct a pre-certification inspection to be
5 attended by Settling Defendants and EPA. If, after the pre-certification inspection, the Settling
6 Defendants still believe that the Work has been fully performed, Settling Defendants shall submit
7 a Consent Decree Work Completion Report. In the report, a registered professional engineer
8 shall state that the Work has been completed in full satisfaction of the requirements of this
9 Consent Decree. The report shall contain the following statement, signed by a responsible
10 corporate official of a Settling Defendant or the Settling Defendants' Project Coordinator:

11
12 To the best of my knowledge, after thorough investigation, I certify that the
13 information contained in or accompanying this submission is true, accurate and
14 complete. I am aware that there are significant penalties for submitting false
information, including the possibility of fine and imprisonment for knowing
violations.

15 If, after review of the written report, EPA, after reasonable opportunity to review and comment
16 by the State, determines that any portion of the Work has not been completed in accordance with
17 this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be
18 undertaken by Settling Defendants pursuant to this Consent Decree to complete the Work.
19 Provided, however, that EPA may only require Settling Defendants to perform such activities
20 pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the
21 remedy selected in the ROD," as that term is defined in Paragraph 12.b. EPA will set forth in the
22 notice a schedule for performance of such activities consistent with the Consent Decree and the
23 SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to
24 Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform

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1 all activities described in the notice in accordance with the specifications and schedules
2 established therein, subject to their right to invoke the dispute resolution procedures set forth in
3 Section XIX (Dispute Resolution).

4
5 b. If EPA concludes, based on the initial or any subsequent request for
6 Certification of Completion by Settling Defendants and after a reasonable opportunity for review
7 and comment by the State, that the Work has been performed in accordance with this Consent
8 Decree, EPA will so notify the Settling Defendants in writing.

9
10 XV. EMERGENCY RESPONSE

11 49. In the event of any action or occurrence during the performance of the Work
12 which causes or threatens a release of Waste Material from the Mouth of the Hylebos Problem
13 Area that constitutes an emergency situation or may present an immediate threat to public health
14 or welfare or the environment, Settling Defendants shall, subject to Paragraph 50, immediately
15 take all appropriate action to prevent, abate, or minimize such release or threat of release, and
16 shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is
17 unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the
18 Settling Defendants shall notify the EPA Emergency Response Unit, Region 10 at (206) 553-
19 1263. Settling Defendants shall take such actions in consultation with EPA's Project Coordinator
20 or other available authorized EPA officer and in accordance with all applicable provisions of the
21 Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents
22 developed pursuant to the SOW. In the event that Settling Defendants fail to take appropriate
23 response action as required by this Section, and EPA takes such action instead, Settling
24 Defendants shall reimburse EPA all costs of the response action not inconsistent with the NCP

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1 pursuant to Section XVI (Reimbursement of Response Costs), unless Settling Defendants invoke
2 dispute resolution proceedings under Section XIX of this Consent Decree and to the extent they
3 prevail in such dispute resolution proceedings.

4
5 50. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to
6 limit any authority of the United States a) to take all appropriate action to protect human health
7 and the environment or to prevent, abate, respond to, or minimize an actual or threatened release
8 of Waste Material on, at, or from the Mouth of the Hylebos Problem Area, or b) to direct or order
9 such action, or seek an order from the Court, to protect human health and the environment or to
10 prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at,
11 or from the Mouth of the Hylebos Problem Area, subject to Section XXI (Covenants Not to Sue
12 by Plaintiff).

13 XVI. PAYMENTS FOR RESPONSE COSTS

14 51. Payments for Future Response Costs.

15
16 a.. Settling Defendants shall pay to EPA all Future Response Costs incurred
17 prior to the Certification of the Work under Section XIV of this Consent Decree that are not
18 inconsistent with the National Contingency Plan, excluding the first \$500,000 of Future
19 Oversight Costs. Settling Defendants shall pay to EPA any and all additional Future Oversight
20 Costs above this amount. On a periodic basis the United States will send Settling Defendants a
21 bill requiring payment that includes a Superfund Cost Recovery Package Imaging and Online
22 System (SCORPIOS) certified summary. Settling Defendants shall make all payments within
23 thirty (30) days of Settling Defendants' receipt of each bill requiring payment, except as
24 otherwise provided in Paragraph 52. Settling Defendants shall make all payments required by

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1 this Paragraph by a certified or cashier's check or checks or wire transfer made payable to "EPA
2 Hazardous Substance Superfund," referencing the name and address of the party making the
3 payment, EPA Site/Spill ID Number 102J, and DOJ Case Number 90-11-2-726/2. Settling
4 Defendants shall send check(s) to:

5 Mellon Bank
6 EPA-Region 10
7 ATTN: Superfund Accounting,
8 P.O. Box 360903M,
9 Pittsburgh, PA 15251

10 b. At the time of payment, Settling Defendants shall send notice that payment
11 has been made to the United States, to EPA and to the Regional Financial Management Officer,
12 in accordance with Section XXVI (Notices and Submissions).

13 c. The total amount to be paid by Settling Defendants pursuant to
14 Subparagraph 51.a. shall be deposited in the Hylebos Waterway Problem Areas Special Account
15 within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance
16 response actions at or in connection with the CB/NT Site, or transferred by EPA to the EPA
17 Hazardous Substance Superfund.
18

19 52. Settling Defendants may contest payment of any Future Response Costs under
20 Paragraph 51 if they determine that the United States has made an accounting error or if they
21 allege that a cost item that is included represents costs that are inconsistent with the NCP. Such
22 objection shall be made in writing within thirty (30) days of receipt of the bill and must be sent to
23 the United States pursuant to Section XXVI (Notices and Submissions). Any such objection
24 shall specifically identify the contested Future Response Costs and the basis for objection. In the

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1 event of an objection, the Settling Defendants shall within the 30-day period pay all uncontested
2 Future Response Costs to the United States in the manner described in Paragraph 51.
3 Simultaneously, the Settling Defendants shall establish an interest-bearing escrow account in a
4 federally-insured bank duly chartered in the State of Washington and remit to that escrow
5 account funds equivalent to the amount of the contested Future Response Costs. The Settling
6 Defendants shall send to the United States, as provided in Section XXVI (Notices and
7 Submissions), a copy of the transmittal letter and check paying the uncontested Future Response
8 Costs, and a copy of the correspondence that establishes and funds the escrow account, including,
9 but not limited to, information containing the identity of the bank and bank account under which
10 the escrow account is established as well as a bank statement showing the initial balance of the
11 escrow account. Simultaneously with establishment of the escrow account, the Settling
12 Defendants shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution).
13 If the United States prevails in the dispute, within five (5) days of the resolution of the dispute,
14 the Settling Defendants shall pay the sums due (with accrued interest) to the United States in the
15 manner described in Paragraph 51. If the Settling Defendants prevail concerning any aspect of
16 the contested costs, the Settling Defendants shall pay that portion of the costs (plus associated
17 accrued interest) for which they did not prevail to the United States in the manner described in
18 Paragraph 51; Settling Defendants shall be disbursed any balance of the escrow account. The
19 dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set
20 forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving
21 disputes regarding the Settling Defendants' obligation to reimburse the United States for its
22 Future Response Costs.

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1 53. In the event that the payments required by Paragraph 51 are not made within
2 thirty (30) days of the Settling Defendants' receipt of the bill, Settling Defendants shall pay
3 Interest on the unpaid balance. The Interest on Future Response Costs shall begin to accrue on
4 the date of the bill. The Interest shall accrue through the date of the Settling Defendant's
5 payment. Payments of Interest made under this Paragraph shall be in addition to such other
6 remedies or sanctions available to Plaintiff by virtue of Settling Defendants' failure to make
7 timely payments under this Section including, but not limited to, payment of stipulated penalties
8 pursuant to Paragraph 72. The Settling Defendants shall make all payments required by this
9 Paragraph in the manner described in Paragraph 51.

10 54. Payment of Settlement Funds to Settling Defendants. EPA shall provide notice to
11 the escrow agent of the Hylebos Waterway Problem Areas Escrow Account to disburse funds
12 from the Hylebos Waterway Problem Areas Escrow Account to the Mouth of the Hylebos
13 Cleanup Account when the following conditions are satisfied: (1) this Consent Decree is entered
14 by the Court; (2) Settling Defendants have established appropriate financial assurances in
15 accordance with Section XIII (Assurance of Ability to Complete Work); (3) the parties to the
16 Cash-Out Consent Decree have delivered funds to the Hylebos Waterway Problem Areas Escrow
17 Account in accordance with the terms of the Cash-Out Consent Decree and its appended Escrow
18 Agreement; (4) an initial distribution of \$434,733.00 has been made from the Hylebos Waterway
19 Problem Areas Escrow Account to the EPA Hylebos Waterway Problem Areas Special Account
20 in accordance with paragraph 6 of the Escrow Agreement appended to the Cash-Out Consent
21 Decree; and (5) the Settling Defendants provide to EPA a copy of a signed final decision by a
22 neutral mediator/arbitrator setting forth a fixed percentage of all funds deposited in the Hylebos
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1 Waterway Problem Areas Escrow Account (less \$434,733.00) to be distributed to the Mouth of
2 Cleanup Account pursuant to the terms and conditions of the Cash-Out Consent Decree.

3
4 55. Upon satisfaction of the conditions set forth in Paragraph 54, and the Settling
5 Defendants' provisions of instructions for transferring funds from the Hylebos Waterway
6 Problem Areas Escrow Account to the Mouth of the Hylebos Cleanup Account, EPA shall take
7 action sufficient to cause a distribution of the funds pursuant to paragraph 6 of the Escrow
8 Agreement appended to the Cash-Out Consent Decree. In accordance with the or decision
9 described in condition (5) of Paragraph 54, and the instructions for transferring funds provided
10 by Settling Defendants, the appropriate fixed percentage of all funds deposited in the Hylebos
11 Waterway Problem Areas Escrow Account (less \$434,733.00) shall be disbursed to the Mouth of
12 the Hylebos Cleanup Account, less one-half fees to be paid pursuant to paragraph 9 of the
13 Escrow Agreement appended to the Cash-Out Consent Decree.

14 56. The Mouth of the Hylebos Cleanup Account shall be maintained as a separate
15 account, and shall only include proceeds distributed to this Account pursuant to Paragraph 55 of
16 this Consent Decree and any interest that accrues thereon. Funds from the Mouth of the Hylebos
17 Cleanup Account distributed to the Port of Tacoma and Occidental Chemical Corporation shall
18 only be used to pay for Remedial Action that has been or will be performed at the Mouth of the
19 Hylebos Waterway Site. The Settling Defendants shall provide to EPA quarterly statements
20 showing the Mouth of the Hylebos Account balance and identifying all invoices paid with Mouth
21 of the Hylebos Account funds. The Settling Defendants shall provide EPA with all invoices if
22 requested by EPA. All funds remaining in the Mouth of the Hylebos Cleanup Account shall be
23 transferred to EPA within three days of any of the following circumstances: (1) EPA certifies
24 completion of the Work pursuant to Paragraph 48 of the Consent Decree; (2) EPA assumes

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1 performance of the Work pursuant to Paragraph 87 of this Consent Decree; or (3) all Settling
2 Defendants become insolvent or cease performing the Work.

3
4 XVII. INDEMNIFICATION AND INSURANCE

5 57. Settling Defendants' Indemnification of the United States

6 a. The United States does not assume any liability by entering into this
7 agreement or by virtue of any designation of Settling Defendants as EPA's authorized
8 representatives under Section 104(e) of CERCLA. Settling Defendants shall indemnify, save and
9 hold harmless the United States and its officials, agents, employees, contractors, subcontractors,
10 or representatives for or from any and all claims or causes of action arising from, or on account
11 of, negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors,
12 employees, agents, contractors, subcontractors, and any persons acting on their behalf or under
13 their control, in carrying out activities pursuant to this Consent Decree, including, but not limited
14 to, any claims arising from any designation of Settling Defendants as EPA's authorized
15 representatives under Section 104(e) of CERCLA. Further, the Settling Defendants agree to pay
16 the United States all costs it incurs including, but not limited to, attorneys fees and other
17 expenses of litigation and settlement arising from, or on account of, claims made against the
18 United States based on negligent or other wrongful acts or omissions of Settling Defendants,
19 their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on
20 their behalf or under their control, in carrying out activities pursuant to this Consent Decree. The
21 United States shall not be held out as a party to any contract entered into by or on behalf of
22 Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither the
23 Settling Defendants nor any such contractor shall be considered an agent of the United States.
24

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1 The United States shall give Settling Defendants notice of any claim for which the United States
2 plans to seek indemnification pursuant to this Paragraph and shall consult with Settling
3 Defendants prior to settling such claim.

4
5 58. Settling Defendants waive all claims against the United States for damages or
6 reimbursement or for set-off of any payments made or to be made to the United States, arising
7 from or on account of any contract, agreement, or arrangement between any one or more of
8 Settling Defendants and any person for performance of Work on or relating to the Mouth of the
9 Hylebos Problem Area, including, but not limited to, claims on account of construction delays.
10 In addition, Settling Defendants shall indemnify and hold harmless the United States with respect
11 to any and all claims for damages or reimbursement arising from or on account of any contract,
12 agreement, or arrangement between any one or more of Settling Defendants and any person for
13 performance of Work on or relating to the Mouth of the Hylebos Problem Area, including, but
14 not limited to, claims on account of construction delays.

15 59. No later than fifteen (15) days before commencing any on-site Work, Settling
16 Defendants shall secure, and shall maintain until the first anniversary of EPA's Certification of
17 Completion of the Remedial Action pursuant to Subparagraph 47.b. of Section XIV
18 (Certification of Completion) comprehensive general liability insurance with limits of \$25
19 million combined single limit, and automobile liability insurance with limits of \$2 million
20 dollars, combined single limit, naming the United States as an additional insured. In addition, for
21 the duration of this Consent Decree, Settling Defendants shall satisfy, or shall ensure that their
22 contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision
23 of worker's compensation insurance for all persons performing the Work on behalf of Settling
24 Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under

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1 this Consent Decree, Settling Defendants shall provide to EPA certificates of such insurance and
2 a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies
3 of policies each year on the anniversary of the Effective Date. If Settling Defendants
4 demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains
5 insurance equivalent to that described above, or insurance covering the same risks but in a lesser
6 amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide
7 only that portion of the insurance described above which is not maintained by the contractor or
8 subcontractor.

9
10 XVIII. FORCE MAJEURE

11 60. "Force majeure," for purposes of this Consent Decree, is defined as any event
12 arising from causes beyond the control of the Settling Defendants, of any entity controlled by
13 Settling Defendants, or of Settling Defendants' contractors, that delays or prevents the
14 performance of any obligation under this Consent Decree despite Settling Defendants' best efforts
15 to fulfill the obligation. The requirement that the Settling Defendants exercise "best efforts to
16 fulfill the obligation" includes using best efforts to anticipate any potential force majeure event
17 and best efforts to address the effects of any potential force majeure event (1) as it is occurring
18 and (2) following the potential force majeure event, such that the delay is minimized to the
19 greatest extent possible. "Force Majeure" does not include financial inability to complete the
20 Work or a failure to attain the Performance Standards.

21 61. If any event occurs or has occurred that may delay the performance of any
22 obligation under this Consent Decree, whether or not caused by a force majeure event, the
23 Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's
24

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1 Alternate Project Coordinator or, in the event both of EPA's designated representatives are
2 unavailable, the Director of the Environmental Cleanup Office, EPA Region 10, within seventy-
3 two (72) hours of when Settling Defendants first knew that the event might cause a delay. If the
4 seventy-two (72) hour notification period expires on a Saturday, Sunday or federal holiday, the
5 Settling Defendants shall provide oral notice no later than 12:00 p.m. (Noon) on the next
6 working day. Within ten (10) days thereafter, Settling Defendants shall provide in writing to
7 EPA an explanation and description of the reasons for the delay; the anticipated duration of the
8 delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for
9 implementation of any measures to be taken to prevent or mitigate the delay or the effect of the
10 delay; the Settling Defendants' rationale for attributing such delay to a force majeure event if they
11 intend to assert such a claim; and a statement as to whether, in the opinion of the Settling
12 Defendants, such event may cause or contribute to an endangerment to public health, welfare or
13 the environment. The Settling Defendants shall include with any notice all available
14 documentation supporting their claim that the delay was attributable to a force majeure. Failure
15 to comply with the above requirements shall preclude Settling Defendants from asserting any
16 claim of force majeure for that event for the period of time of such failure to comply, and for any
17 additional delay caused by such failure. Settling Defendants shall be deemed to know of any
18 circumstance of which Settling Defendants, any entity controlled by Settling Defendants, or
19 Settling Defendants' contractors knew or should have known.

20
21 62. If EPA agrees that the delay or anticipated delay is attributable to a force majeure
22 event, the time for performance of the obligations under this Consent Decree that are affected by
23 the force majeure event will be extended by EPA for such time as is necessary to complete those
24 obligations. An extension of the time for performance of the obligations affected by the force

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1 majeure event shall not, of itself, extend the time for performance of any other obligation not
2 affected by the force majeure event. If EPA does not agree that the delay or anticipated delay has
3 been or will be caused by a force majeure event, EPA will notify the Settling Defendants in
4 writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA
5 will notify the Settling Defendants in writing of the length of the extension, if any, for
6 performance of the obligations affected by the force majeure event.

7
8 63. If the Settling Defendants elect to invoke the dispute resolution procedures set
9 forth in Section XIX (Dispute Resolution), they shall do so no later than thirty (30) days after
10 receipt of EPA's notice. In any such proceeding, Settling Defendants shall have the burden of
11 demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or
12 will be caused by a force majeure event, that the duration of the delay or the extension sought
13 was or will be warranted under the circumstances, that best efforts were exercised to avoid and
14 mitigate the effects of the delay, and that Settling Defendants complied with the requirements of
15 Paragraphs 60 and 61, above. If Settling Defendants carry this burden, the delay at issue shall be
16 deemed not to be a violation by Settling Defendants of the affected obligation of this Consent
17 Decree identified to EPA and the Court.

18 XIX. DISPUTE RESOLUTION

19
20 64. Unless otherwise expressly provided for in this Consent Decree, the dispute
21 resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising
22 under or with respect to this Consent Decree. However, the procedures set forth in this Section
23 shall not apply to actions by the United States to enforce obligations of the Settling Defendants
24 that have not been disputed in accordance with this Section.

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1 65. Any dispute which arises under or with respect to this Consent Decree shall in the
2 first instance be the subject of informal negotiations between the parties to the dispute. The
3 period for informal negotiations shall not exceed twenty (20) days from the time the dispute
4 arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall
5 be considered to have arisen when one party sends the other party a written Notice of Dispute.

6 66. Statements of Position.

7
8 a. In the event that the parties cannot resolve a dispute by informal
9 negotiations under the preceding Paragraph, then the position advanced by EPA shall be
10 considered binding unless, within twenty (20) days after the conclusion of the informal
11 negotiation period, Settling Defendants invoke the formal dispute resolution procedures of this
12 Section by serving on the United States a written Statement of Position on the matter in dispute,
13 including, but not limited to, any factual data, analysis or opinion supporting that position and
14 any supporting documentation relied upon by the Settling Defendants. The Statement of Position
15 shall specify the Settling Defendants' position as to whether formal dispute resolution should
16 proceed under Paragraph 67 or Paragraph 68.

17 b. Within 20 days after receipt of Settling Defendants' Statement of Position,
18 EPA will serve on Settling Defendants its Statement of Position, including, but not limited to,
19 any factual data, analysis, or opinion supporting that position and all supporting documentation
20 relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal
21 dispute resolution should proceed under Paragraph 67 or 68. Within 7 days after receipt of EPA's
22 Statement of Position, Settling Defendants may submit a Reply.
23
24

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1 c. If there is disagreement between EPA and the Settling Defendants as to
2 whether dispute resolution should proceed under Paragraph 67 or 68, the parties to the dispute
3 shall follow the procedures set forth in the paragraph determined by EPA to be applicable.
4 However, if the Settling Defendants ultimately appeal to the Court to resolve the dispute, the
5 Court shall determine which paragraph is applicable in accordance with the standards of
6 applicability set forth in Paragraphs 67 and 68.

7
8 67. Formal dispute resolution for disputes pertaining to the selection or adequacy of
9 any response action and all other disputes that are accorded review on the administrative record
10 under applicable principles of administrative law shall be conducted pursuant to the procedures
11 set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action
12 includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to
13 implement plans, or any other items requiring approval by EPA under this Consent Decree; and
14 (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree.
15 Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants
16 regarding the validity of the ROD's provisions.

17 a. An administrative record of the dispute shall be maintained by EPA and
18 shall contain all statements of position, including supporting documentation, submitted pursuant
19 to this Section. Where appropriate, EPA may allow submission of supplemental statements of
20 position by the parties to the dispute.

21 b. The Director of the Office of Environmental Cleanup, EPA Region 10,
22 will issue a final administrative decision resolving the dispute based on the administrative record
23

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1 described in Paragraph 67.a. This decision shall be binding upon the Settling Defendants,
2 subject only to the right to seek judicial review pursuant to Paragraph 67.c. and d.

3 c. Any administrative decision made by EPA pursuant to Paragraph 67.b.
4 shall be reviewable by this Court, provided that a motion for judicial review of the decision is
5 filed by the Settling Defendants with the Court and served on all Parties within twenty (20) days
6 of receipt of the final decision by the Director of the Office of Environmental Cleanup, EPA
7 Region 10. The motion shall include a description of the matter in dispute, the efforts made by
8 the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute
9 must be resolved to ensure orderly implementation of this Consent Decree. The United States
10 may file a response to Settling Defendants' motion within twenty (20) days of receipt of the
11 motion or within any different time frame that the local court rules may provide, and Settling
12 Defendants may file a reply brief within five (5) days of receipt of the response or such different
13 time frame that the local court rules may provide.

14
15 d. In proceedings on any dispute governed by this Paragraph, Settling
16 Defendants shall have the burden of demonstrating that the decision of the Director of the Office
17 of Environmental Cleanup is arbitrary and capricious or otherwise not in accordance with law.
18 Judicial review of EPA's decision shall be on the administrative record compiled pursuant to
19 Paragraph 67.a.

20
21 68. Formal dispute resolution for disputes that neither pertain to the selection or
22 adequacy of any response action nor are otherwise accorded review on the administrative record
23 under applicable principles of administrative law, shall be governed by this Paragraph.
24

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1 a. Following receipt of Settling Defendants' Statement of Position submitted
2 pursuant to Paragraph 66, the Director of the Office of Environmental Cleanup, EPA Region 10,
3 will issue a final decision resolving the dispute. The decision of the Director of the Office of
4 Environmental Cleanup shall be binding on the Settling Defendants unless, within twenty (20)
5 days of receipt of the decision, the Settling Defendants file with the Court and serve on the
6 parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts
7 made by the parties to resolve it, the relief requested, and the schedule, if any, within which the
8 dispute must be resolved to ensure orderly implementation of the Consent Decree. The United
9 States may file a response to Settling Defendants' motion within twenty (20) days of receipt of
10 the motion or within any different time frame that the local court rules may provide, and Settling
11 Defendants may file a reply brief within five (5) days of receipt of the response or such different
12 time frame that the local court rules may provide.

13
14 b. Notwithstanding Paragraph Y of Section I (Background) of this Consent
15 Decree, judicial review of any dispute governed by this Paragraph shall be governed by
16 applicable principles of law.

17 69. The invocation of formal dispute resolution procedures under this Section shall
18 not extend, postpone or affect in any way any obligation of the Settling Defendants under this
19 Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated
20 penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed
21 pending resolution of the dispute as provided in Paragraph 78. Notwithstanding the stay of
22 payment, stipulated penalties shall accrue from the first day of noncompliance with any
23 applicable provision of this Consent Decree. In the event that the Settling Defendants do not
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1 prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in
2 Section XX (Stipulated Penalties).

3
4 XX. STIPULATED PENALTIES

5 70. Settling Defendants shall be liable for stipulated penalties in the amounts set forth
6 in Paragraphs 71 and 72 to the United States for failure to comply with the requirements of this
7 Consent Decree specified below, unless excused under Section XVIII (Force Majeure) or
8 otherwise resolved in Dispute Resolution. "Compliance" by Settling Defendants shall include
9 completion of the activities under this Consent Decree or SOW or other Work plan approved
10 under this Consent Decree identified below in accordance with all applicable requirements of
11 law, this Consent Decree, the SOW, and any plans or other documents approved by EPA
12 pursuant to this Consent Decree and within the specified time schedules established by and
13 approved under this Consent Decree.

14 71. Stipulated Penalty Amounts - Work.

15
16 a. The following stipulated penalties shall accrue per violation per day for
17 any noncompliance identified in Subparagraph 71.b after the opportunity to cure submissions
18 pursuant to Section XI of this Consent Decree, if applicable:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 30th day
\$5,000	31st through 60th day
\$8,000	61st day and beyond

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b. Compliance Milestones.

1. Remedial Action Work Plans - failure to submit timely or adequate draft and revised final drafts of any such plans
2. Remedial Action Construction Schedules -- failure to perform remedial action construction or any discrete phases and/or individual components of the remedial action on the approved schedule or in an adequate manner or not in compliance with the SOW or approved remedial action work plan or deliverables
3. Completion Reports - failure to submit timely or adequate completion reports listed below
 - a. Remedial Action Construction Report
 - b. Remedial Action Completion Report
- 4.. Operation, Maintenance and Monitoring
 - a. failure to perform timely and adequate monitoring in accordance with the approved OMMP and approved schedule
 - b. failure to submit timely and adequate monitoring reports

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- c. failure to perform maintenance on any component of the remedial action on the required schedule and in accordance with approved work plans or EPA requests

72. Stipulated Penalty Amounts - Reports, Other Deliverables, and Other Violations of the Consent Decree.

- a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate monthly progress reports, any deliverable required by the SOW or this Consent Decree after the opportunity to cure submissions pursuant to Section XI of this Consent Decree, except those listed in Paragraph 71.b. above, or any other violation of this Consent Decree, including, but not limited to, late payments required under this Consent Decree :

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$2,500	31st day and beyond

73. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 87 of Section XXI (Covenants Not to Sue by Plaintiff), Settling Defendants shall be liable for a stipulated penalty in the amount of three times the cost incurred by EPA to perform the work or \$1,000,000, whichever is less.

74. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, except as otherwise provided in this Consent Decree, and shall

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1 continue to accrue through the final day of the correction of the noncompliance or completion of
2 the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient
3 submission under Section XI (EPA Approval of Plans and Other Submissions), until receipt of
4 the second notice of deficiency during the period, if any, beginning on the 21st day after EPA's
5 receipt of such submission until the date that EPA notifies Settling Defendants of any deficiency;
6 (2) with respect to a decision by the Director of the Office of Environmental Cleanup, EPA
7 Region 10, under Paragraph 67.b. or 68.a of Section XIX (Dispute Resolution), during the
8 period, if any, beginning on the 21st day after the date that Settling Defendants' reply to EPA's
9 Statement of Position is received until the date that the Director issues a final decision regarding
10 such dispute; or (3) with respect to judicial review by this Court of any dispute under Section
11 XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's
12 receipt of the final submission regarding the dispute until the date that the Court issues a final
13 decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of
14 separate penalties for separate violations of this Consent Decree.

15
16 75. Following EPA's determination that Settling Defendants have failed to comply
17 with a requirement of this Consent Decree, EPA may give Settling Defendants written
18 notification of the same and describe the noncompliance. For violations based on submissions
19 or Work being inadequately prepared or performed, EPA shall provide written notification and
20 describe the noncompliance. EPA shall send the Settling Defendants a written demand for the
21 payment of the penalties. However, penalties shall begin accruing as provided in the preceding
22 Paragraph regardless of whether EPA has notified the Settling Defendants of a violation or when
23 the demand is sent.

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1 76. All penalties accruing under this Section shall be due and payable to the United
2 States within thirty (30) days of the Settling Defendants' receipt from EPA of a demand for
3 payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures
4 under Section XIX (Dispute Resolution). All payments of stipulated penalties made under this
5 Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's
6 check made payable to "EPA Hazardous Substance Superfund," shall be mailed to Mellon Bank,
7 EPA-Region 10, ATTN Superfund Accounting, P.O. Box 360903M, Pittsburgh, PA 15251, shall
8 indicate that the payment is for stipulated penalties, and shall reference the EPA Region and
9 Site/Spill ID, and DOJ Case Number 90-11-2-726/2, and the name and address of the party
10 making payment. Copies of check(s) paid pursuant to this Section, and any accompanying
11 transmittal letter(s), shall be sent to the United States as provided in Section XXVI (Notices and
12 Submissions), and to the EPA Regional Financial Management Officer.

13 77. The payment of penalties shall not alter in any way Settling Defendants' obligation
14 to complete the performance of the Work required under this Consent Decree.

15 78. Penalties shall continue to accrue as provided in Paragraph 74 during any dispute
16 resolution period, but need not be paid until the following:

17 a. If the dispute is resolved by agreement or by a decision of EPA that is not
18 appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within
19 fifteen (15) days of the agreement or the receipt of EPA's decision or order;
20

21 b. If the dispute is appealed to this Court and the United States prevails in
22 whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to
23

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1 be owed to EPA within sixty (60) days of receipt of the Court's decision or order, except as
2 provided in Subparagraph c below;

3
4 c. If the United States prevails in whole or in part, and the District Court's
5 decision is appealed by any Party, Settling Defendants shall pay all accrued penalties determined
6 by the District Court to be owing to the United States into an interest-bearing escrow account
7 within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this
8 account as they continue to accrue, at least every sixty (60) days. Within fifteen (15) days of
9 receipt of the final appellate court decision, the escrow agent shall pay the balance of the account
10 to EPA or to Settling Defendants to the extent that they prevail. If the United States does not
11 prevail in whole or in part, no such penalties shall be assessed against Settling Defendants.

12 79. If Settling Defendants fail to pay stipulated penalties when due, the United States
13 may institute proceedings to collect the penalties, as well as interest. Settling Defendants shall
14 pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made
15 pursuant to Paragraph 76.

16
17 80. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in
18 any way limiting the ability of the United States to seek any other remedies or sanctions available
19 by virtue of Settling Defendants' violation of this Consent Decree or of the statutes and
20 regulations upon which it is based, including, but not limited to, penalties pursuant to Section
21 122(l) of CERCLA. Provided, however, that the United States shall not seek civil penalties
22 pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is
23 provided herein, except in the case of a willful violation of the Consent Decree.

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81. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

XXI. COVENANTS BY PLAINTIFF

82. In consideration of the actions and commitments that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 83, 84, and 86 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA relating to the Hylebos Waterway Problem Area. Except with respect to future liability, these covenants not to sue shall take effect upon the Effective Date of this Consent Decree. With respect to future liability for the Mouth of the Hylebos Waterway Problem Area, these covenants shall take effect upon Certification of Completion of Remedial Action by EPA for the Mouth of the Hylebos Waterway Problem Area pursuant to Paragraph 47.b of Section XIV (Certification of Completion). With respect to future liability for the Head of the Hylebos Waterway Problem Area, these covenants shall take effect upon Certification of Completion of Remedial Action by EPA for the Head of the Hylebos Waterway Problem Area. These covenants are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

83. United States' Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without

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1 prejudice to, the right to institute proceedings in this action or in a new action, or to issue an
2 administrative order seeking to compel Settling Defendants,

3 a. to perform further response actions relating to the Mouth of the Hylebos
4 Waterway Problem Area or

5
6 b. to reimburse the United States for additional costs of response if, prior to
7 Certification of Completion of the Remedial Action:

8 (1) conditions at the Mouth of the Hylebos Waterway Problem Area,
9 previously unknown to EPA, are discovered, or

10
11 (2) information, previously unknown to EPA, is received, in whole or
12 in part,

13 and EPA determines that these previously unknown conditions or information together with any
14 other relevant information indicates that the Remedial Action is not protective of human health
15 or the environment.

16
17 84. United States' Post-certification Reservations. Notwithstanding any other
18 provision of this Consent Decree, the United States reserves, after Certification of Completion of
19 Remedial Action and this Consent Decree is without prejudice to, the right to institute
20 proceedings in this action or in a new action, or to issue an administrative order seeking to
21 compel Settling Defendants,

22 a. to perform further response actions relating to the Mouth of the Hylebos
23 Waterway Problem Area or

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1 b. to reimburse the United States for additional costs of response if,
2 subsequent to Certification of Completion of the Remedial Action:

3 (1) conditions at the Mouth of the Hylebos Waterway Problem Area,
4 previously unknown to EPA, are discovered, or
5

6 (2) information, previously unknown to EPA, is received, in whole or
7 in part,
8

9 and EPA determines that these previously unknown conditions or this information together with
10 other relevant information indicate that the Remedial Action is not protective of human health or
11 the environment.

12 85. For purposes of Paragraph 83, the information and the conditions known to EPA
13 shall include only that information and those conditions known to EPA as of the date this
14 Consent Decree is lodged as set forth in the Record of Decision, the administrative records
15 supporting the Record of Decision, the July 1997 and August 2000 ESDs, and any EPA approved
16 remedial design submittals generated by the Settling Defendants as of the date this Consent
17 Decree is lodged. For purposes of Paragraph 84, the information and the conditions known to
18 EPA shall include only that information and those conditions known to EPA as of the date of
19 Certification of Completion of the Remedial Action as set forth in the Record of Decision, the
20 administrative records supporting the Record of Decision and July, 1997 and August, 2000
21 ESDs, and any information received by EPA pursuant to the requirements of this Consent Decree
22 prior to Certification of Completion of the Remedial Action.
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1 86. General reservations of rights. The United States reserves, and this Consent
2 Decree is without prejudice to, all rights against Settling Defendants with respect to all matters
3 not expressly included within Plaintiff's covenant not to sue. Notwithstanding any other
4 provision of this Consent Decree, the United States reserves all rights against Settling Defendants
5 with respect to:

6 a. claims based on a failure by Settling Defendants to meet a requirement of
7 this Consent Decree;

8
9 b. liability arising from the past, present, or future disposal, release, or threat
10 of release of Waste Materials outside of the Hylebos Waterway Problem Area, including, but not
11 limited to, any other Problem Area or Operable Unit in the CB/NT Site;

12 c. future liability based upon the Settling Defendants' ownership or operation
13 of property within the Hylebos Waterway Problem Area, or upon the Settling Defendants'
14 transportation, treatment, storage, or disposal, or the arrangement for the transportation,
15 treatment, storage, or disposal of Waste Material at or in connection with the Hylebos Waterway
16 Problem Area, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after
17 signature of this Consent Decree by the Settling Defendants;

18
19 d. liability for hazardous substances buried at subsurface depths at the
20 Hylebos Waterway Problem Area as of the Effective Date of this Consent Decree and are located
21 within no action areas as designated in the August 2000 ESD which hazardous substances were
22 released by Settling Defendants or their tenants or came to be located on property owned or
23 operated by Settling Defendants and, in EPA's discretion, require response action;

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1 e. liability for response actions in the Head of the Hylebos Waterway
2 Problem Area or Occidental Site if other parties do not perform required response actions under
3 an Order or a consent decree;

4 f. with respect to all Settling Defendants other than the Port of Tacoma,
5 liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of
6 any natural resource damage assessments;

7 g. criminal liability;

8 h. liability for violations of federal or state law which occur during or after
9 implementation of the Remedial Action at the Hylebos Waterway; and

10 i. liability, prior to Certification of Completion of the Remedial Action at the
11 Mouth of the Hylebos Problem Area, for additional response actions that EPA determines are
12 necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph
13 12 (Modification of the SOW or Related Work Plans);

14 87. Work Takeover. In the event EPA determines that Settling Defendants have
15 ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in
16 their performance of the Work, after providing Settling Defendants one opportunity to cure and
17 after notice to Settling Defendants, EPA may assume the performance of all or any portions of
18 the Work as EPA determines necessary. In the event EPA determines that Settling Defendants
19 are implementing the Work in a manner which may cause an endangerment to human health or
20 the environment, EPA may assume the performance of all or any portion of the Work as EPA
21 determines necessary without notice or opportunity to cure to Settling Defendants. Settling

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Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 67, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI (Reimbursement of Response Costs).

88. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

XXII. COVENANTS BY SETTLING DEFENDANTS

89. Covenant Not to Sue by Settling Defendants. Subject to the reservations in Paragraph 90, Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States with respect to the Hylebos Waterway Problem Area or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Hylebos Waterway Problem Area; or

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1 c. any claims arising out of response activities at the Hylebos Waterway
2 Problem Area, including claims based on EPA's selection of response actions, oversight of
3 response activities or approval of plans for such activities, including any claim under the United
4 States Constitution, the Washington State Constitution, the Tucker Act, 28 U.S.C. § 1491, the
5 Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

6
7 d. any direct or indirect claim for disbursement from the Hylebos Waterway
8 Problem Areas Special Account, except as expressly provided in Paragraphs 54, 55 and 56 of this
9 Consent Decree.

10
11 90. The Settling Defendants reserve, and this Consent Decree is without prejudice to:

12 a. claims against the United States, subject to the provisions of Chapter 171
13 of Title 28 of the United States Code, for money damages for injury or loss of property or
14 personal injury or death caused by the negligent or wrongful act or omission of any employee of
15 the United States while acting within the scope of his office or employment under circumstances
16 where the United States, if a private person, would be liable to the claimant in accordance with
17 the law of the place where the act or omission occurred. However, any such claim shall not
18 include a claim for any damages caused, in whole or in part, by the act or omission of any person,
19 including any contractor, who is not a federal employee as that term is defined in 28 U.S.C.
20 § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or
21 the oversight or approval of the Settling Defendants' plans or activities. The foregoing applies
22 only to claims which are brought pursuant to any statute other than CERCLA and for which the
23 waiver of sovereign immunity is found in a statute other than CERCLA; and
24

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1 b. contribution claims against the United States arising out of an action
2 initiated under 42 U.S.C. § 9607(f) for natural resource damages pertaining to the Hylebos
3 Waterway Site.

4
5
6 91. Nothing in this Consent Decree shall be deemed to constitute preauthorization of
7 a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R.
8 § 300.700(d).

9
10 XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

11 92. Nothing in this Consent Decree shall be construed to create any rights in, or grant
12 any cause of action to, any person not a Party to this Consent Decree. The preceding sentence
13 shall not be construed to waive or nullify any rights that any person not a signatory to this decree
14 may have under applicable law. Each of the Parties expressly reserves any and all rights
15 (including, but not limited to, any right to contribution), defenses, claims, demands, and causes
16 of action which each Party may have with respect to any matter, transaction, or occurrence
17 relating in any way to the CB/NT Site against any person not a Party hereto nor a Party to that
18 consent decree related to remedial action at the Head of the Hylebos Waterway Problem Area.

19 93. The Parties agree, and by entering this Consent Decree this Court finds, that the
20 Settling Defendants are entitled, as of the Effective Date, to protection from contribution actions
21 or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters
22 addressed in this Consent Decree. "Matters Addressed" in this Consent Decree include all
23 response actions taken or to be taken, and all response costs incurred or to be incurred by the
24

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1 United States, the Settling Defendants, the parties implementing remedial design and remedial
2 action in the Head of the Hylebos Waterway or any other person with respect to the Hylebos
3 Waterway Problem Area. Matters Addressed shall not include those response costs or response
4 actions as to which the United States has reserved its rights under this Consent Decree, in the
5 event that the United States asserts such rights against Settling Defendants of this Consent
6 Decree.

7
8 94. The Settling Defendants agree that with respect to any suit or claim for
9 contribution brought by them for matters related to this Consent Decree they will notify the
10 United States in writing no later than sixty (60) days prior to the initiation of such suit or claim.

11 95. The Settling Defendants also agree that with respect to any suit or claim for
12 contribution brought against them for matters related to this Consent Decree they will notify in
13 writing the United States within ten (10) days of service of the complaint on them. In addition,
14 Settling Defendants shall notify the United States within ten (10) days of service or receipt of any
15 Motion for Summary Judgment and within ten (10) days of receipt of any order from a court
16 setting a case for trial.

17 96. In any subsequent administrative or judicial proceeding initiated by the United
18 States for injunctive relief, recovery of response costs, or other appropriate relief relating to the
19 CB/NT Site or Hylebos Waterway Problem Area, Settling Defendants shall not assert, and may
20 not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral
21 estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the
22 claims raised by the United States in the subsequent proceeding were or should have been
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brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants by Plaintiff).

XXIV. ACCESS TO INFORMATION

97. Until ten (10) years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 48 of Section XIV (Certification of Completion of the Work), Settling Defendants shall provide to EPA, upon request, copies of all documents and information in hardcopy or in electronic format or other format requested by EPA within their possession or control or that of their contractors or agents relating to activities at the Mouth of the Hylebos Waterway Problem Area or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information (printed or electronic) related to the Work. Notwithstanding the time frame provided in the preceding sentence, Settling Defendants shall, upon request, provide copies of all documents and information in hardcopy or in electronic format or other format requested by EPA within their possession or control or within the possession or control of their contractors, consultants or agents relating to long-term operation, maintenance and monitoring and other activities that may continue beyond Certification of Completion of the Remedial Action under this Consent Decree. Settling Defendants shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

98. Business Confidential and Privileged Documents.

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1 a. Settling Defendants may assert business confidentiality claims covering
2 part or all of the documents or information submitted to Plaintiff under this Consent Decree to
3 the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C.
4 § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential
5 by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of
6 confidentiality accompanies documents or information when they are submitted to EPA, or if
7 EPA has notified Settling Defendants that the documents or information are not confidential
8 under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public
9 may be given access to such documents or information without further notice to Settling
10 Defendants.

11 b. The Settling Defendants may assert that certain documents, records and
12 other information are privileged under the attorney-client privilege or any other privilege
13 recognized by federal law. If the Settling Defendants assert such a privilege in lieu of providing
14 documents, they shall provide the Plaintiff with the following: (1) the title of the document,
15 record, or information; (2) the date of the document, record, or information; (3) the name and
16 title of the author of the document, record, or information; (4) the name and title of each
17 addressee and recipient; (5) a description of the contents of the document, record, or information;
18 and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other
19 information created or generated pursuant to the requirements of the Consent Decree shall be
20 withheld on the grounds that they are privileged.

21
22 99. No claim of confidentiality shall be made with respect to any data, including, but
23 not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or
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1 engineering data, or any other documents or information evidencing conditions at or around the
2 Hylebos Waterway Problem Area.

3
4 XXV. RETENTION OF RECORDS

5 100. Until ten (10) years after the Settling Defendants' receipt of EPA's notification
6 pursuant to Paragraph 48 of Section XIV (Certification of Completion of the Work), each
7 Settling Defendant shall preserve and retain all non-identical copies of records and documents
8 (including records and documents in electronic form) now in its possession or control or which
9 come into its possession or control that relate in any manner to its liability under CERCLA or the
10 liability of any other person under CERCLA with respect to the Hylebos Waterway Problem
11 Area. Each Settling Defendant must also retain, and instruct its contractors and agents to
12 preserve, for the same period of time specified above all non-identical copies of the last draft or
13 final version of any documents or records (including documents or records in electronic form)
14 now in its possession or control or which come into its possession or control that relate in any
15 manner to the performance of the Work, provided, however, that each Settling Defendant (and its
16 contractors and agents) must retain, in addition, copies of all data generated during the
17 performance of the Work and not contained in the aforementioned documents required to be
18 retained. Each of the above record retention requirements shall apply regardless of any corporate
19 retention policy to the contrary.

20 101. At the conclusion of this document retention period, Settling Defendants shall
21 notify the United States at least 90 days prior to the destruction of any such records or
22 documents, and, upon request by the United States, Settling Defendants shall deliver any such
23 records or documents to EPA. The Settling Defendants may assert that certain documents,
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1 records and other information are privileged under the attorney-client privilege or any other
2 privilege recognized by federal law. If the Settling Defendants assert such a privilege, they shall
3 provide the Plaintiffs with the following: (1) the title of the document, record, or information;
4 (2) the date of the document, record, or information; (3) the name and title of the author of the
5 document, record, or information; (4) the name and title of each addressee and recipient; (5) a
6 description of the subject of the document, record, or information; and (6) the privilege asserted
7 by Settling Defendants. However, no documents, reports or other information created or
8 generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds
9 that they are privileged.

10
11 102. Each Settling Defendant hereby certifies individually that, to the best of its
12 knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed
13 or otherwise disposed of any records, documents or other information (other than identical
14 copies) relating to its potential liability regarding the Hylebos Waterway Problem Area since
15 notification of potential liability by the United States or the filing of suit against it regarding the
16 Hylebos Waterway Problem Area and that it has fully complied with any and all EPA requests
17 for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and
18 9622(e), and Section 3007 of RCRA, 42 U.S.C. 6927.

19 XXVI. NOTICES AND SUBMISSIONS

20
21 103. Whenever, under the terms of this Consent Decree, written notice is required to be
22 given or a report or other document is required to be sent by one Party to another, it shall be
23 directed to the individuals at the addresses specified below, unless those individuals or their
24 successors give notice of a change to the other Parties in writing. All notices and submissions

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1 shall be considered effective upon receipt, unless otherwise provided. Written notice as specified
2 herein shall constitute complete satisfaction of any written notice requirement of the Consent
3 Decree with respect to the United States, EPA and the Settling Defendants, respectively.

4 As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # _____

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11
12 and

Chief, Environmental Defense Section
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 23986
Washington D.C. 20026-3986
Re: DJ # _____

13
14 Director, Environmental Cleanup Office
United States Environmental Protection Agency
Region 10
ECL - 113
1200 Sixth Avenue
Seattle, Washington 98101

15
16
17
18 As to EPA:

Jonathan Williams
EPA Project Coordinator
United States Environmental Protection Agency
Region 10
ECL - 111
1200 Sixth Avenue
Seattle, Washington 98101

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1 As to the Regional Financial Management Officer:

2
3 Ruth Broome
4 Office of Management Programs
5 U.S. Environmental Protection Agency
6 OMP-146
7 1200 Sixth Avenue
8 Seattle, Washington 98101

6 As to the Settling Defendants:

7 Suzanne Dudziak
8 Port of Tacoma
9 P.O. Box 1837
10 Tacoma, Washington 98401-1837

11 Pioneer Americas LLC
12 c/o Sam Chamberlain
13 700 Louisiana, Suite 4300
14 Houston, Texas 77002

15 Occidental Chemical Corporation
16 Mariana Properties, Inc.
17 c/o F. Allen Meek, Jr.
18 Glenn Springs Holdings, Inc.
19 2480 Fortune Drive, Suite 300
20 Lexington, Kentucky 40509

17 XXVII. EFFECTIVE DATE

18 104. The effective date of this Consent Decree shall be the date upon which this
19 Consent Decree is entered by the Court, except as otherwise provided herein.
20

21 XXVIII. RETENTION OF JURISDICTION

22 105. This Court retains jurisdiction over both the subject matter of this Consent Decree
23 and the Settling Defendants for the duration of the performance of the terms and provisions of
24

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1 this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any
2 time for such further order, direction, and relief as may be necessary or appropriate for the
3 construction or modification of this Consent Decree, or to effectuate or enforce compliance with
4 its terms, or to resolve disputes in accordance with Section XIX (Dispute Resolution) hereof.

5
6 XXIX. APPENDICES

7 106. The following appendices are attached to and incorporated into this Consent
8 Decree:

9 "Appendix A" is the SOW.

10 "Appendix B" is the map of the Hylebos Waterway Problem Area.

11 "Appendix C" is the map of the Mouth of the Hylebos Problem Area and the Occidental
12 Site.
13

14
15 XXX. COMMUNITY RELATIONS

16 107. Settling Defendants shall propose to EPA their participation in the community
17 relations plan developed by EPA. EPA will determine the participation role for the Settling
18 Defendants under the Plan. Settling Defendants shall also cooperate with EPA in providing
19 information regarding the Work to the public. As requested by EPA, Settling Defendants shall
20 participate in the preparation of such information for dissemination to the public and in public
21 meetings which may be held or sponsored by EPA to explain activities at or relating to the Mouth
22 of the Hylebos Problem Area.
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XXXI. MODIFICATION

108. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Settling Defendants. All such modifications shall be made in writing.

109. Except as provided in Paragraph 12 ("Modification of the SOW or related Work Plans"), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendants, and the Court, if such modifications fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii). Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document, or material modifications to the SOW that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii), may be made by written agreement between EPA and the Settling Defendants.

110. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

111. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or

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1 considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate.
2 Settling Defendants consent to the entry of this Consent Decree without further notice.

3
4 112. By executing this Consent Decree, and taking action under this Consent Decree,
5 Settling Defendants do not intend to amend or alter any previously existing contractual
6 agreement between or among any of the Settling Defendants. By executing this Consent Decree,
7 and taking action under this Consent Decree, Settling Defendants and the United States do not
8 intend to amend or alter any previously existing contractual agreement between or among any of
9 the Settling Defendants and the United States other than the HCC AOC. Nothing in this Consent
10 Decree is intended to alter the rights or obligations of the parties to the Cash-Out Consent
11 Decree.

12 113. If for any reason the Court should decline to approve this Consent Decree in the
13 form presented, this agreement is voidable at the sole discretion of any Party and the terms of the
14 agreement may not be used as evidence in any litigation between the Parties.

15 XXXIII. SIGNATORIES/SERVICE
16

17 114. Each undersigned representative of a Settling Defendant to this Consent Decree
18 and the Assistant Attorney General for the Environment and Natural Resources Division of the
19 Department of Justice certifies that he or she is fully authorized to enter into the terms and
20 conditions of this Consent Decree and to execute and legally bind such Party to this document.

21 115. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree
22 by this Court or to challenge any provision of this Consent Decree unless the United States has
23 notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.
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1 116. Each Settling Defendant shall identify, on the attached signature page, the name,
2 address and telephone number of an agent who is authorized to accept service of process by mail
3 on behalf of that Party with respect to all matters arising under or relating to this Consent Decree.
4 Settling Defendants hereby agree to accept service in that manner and to waive the formal service
5 requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local
6 rules of this Court, including, but not limited to, service of a summons. Settling Defendants need
7 not file an answer to the complaint in this action unless or until the court expressly declines to
8 enter this Consent Decree.

9
10 XXXIV. FINAL JUDGMENT

11 117. This Consent Decree and its appendices constitute the final, complete, and
12 exclusive agreement and understanding among the parties with respect to the settlement
13 embodied in the Consent Decree. The parties acknowledge that there are no representations,
14 agreements, or understandings relating to the settlement other than those expressly contained in
15 this Consent Decree.

16
17 118. Upon approval and entry of this Consent Decree by the Court, this Consent
18 Decree shall constitute a final judgment between and among the United States and the Settling
19 Defendants. The Court finds that there is no just reason for delay and therefore enters this
20 judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

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SO ORDERED THIS __ DAY OF _____, 20__.

United States District Judge

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1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v.
2 Port of Tacoma, et al., relating to the Mouth Hylebos Waterway Problem Area within the
3 Commencement Bay Nearshore/Tideflats Superfund Site.

4
5 **FOR THE UNITED STATES OF AMERICA**

6
7 1.25.05
8 Date

Thomas L. Sansonetti
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

11
12 _____
13 Date

Michael J. McNulty
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

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1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v.
2 Port of Tacoma, et al., relating to the Mouth Hylebos Waterway Problem Area within the
3 Commencement Bay Nearshore/Tideflats Superfund Site.

4
5 1/14/05
6 Date

Rohald A. Kreizenbeck
Acting Regional Administrator, Region 10
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101

7
8
9
10 1/14/05
11 Date

Ted Yackulic
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 10
ORC-158
1200 Sixth Avenue
Seattle, Washington 98101

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1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v.
2 Port of Tacoma, et al., relating to the Mouth Hylebos Waterway Problem Area within the
3 Commencement Bay Nearshore/Tideflats Superfund Site.

4 FOR Port of Tacoma
5 COMPANY, INC.*/

6
7 1/13/05
8 Date /

Signature: [Signature]

Name (print): Timothy J. Farrell

Title: Port of Tacoma Executive Director

Address: Port of Tacoma
One Sitcum Plaza
Tacoma, WA 98421

12 Agent Authorized to Accept Service on Behalf of Above-signed Party:

15 Name (print): Andy Michels

16 Title: Risk Manager

17 Address: Port of Tacoma
One Sitcum Plaza, Tacoma 98421
PO Box 1837, Tacoma, WA 98401

18 Ph. Number:

20 */ A separate signature page must be signed by each corporation, individual or other legal entity
21 that is settling with the United States.
22
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1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v.
2 Port of Tacoma, et al., relating to the Mouth Hylebos Waterway Problem Area within the
3 Commencement Bay Nearshore/Tideflats Superfund Site.

4 FOR MARIANA PROPERTIES, INC.

5
6
7 14 JANUARY 2005
8 Date

Signature: 

Name (print): ELLEN DRISKO

Title: PRESIDENT

Address: 2480 Fortune Dr., Suite 300
Lexington, KY 40509

10
11
12 Agent Authorized to Accept Service on Behalf of Above-signed Party:

13
14
15 Name (print): SCOTT A. KING

16 Title: VICE PRESIDENT & GENERAL COUNSEL

17 Address: OCCIDENTAL CHEMICAL CORPORATION
18 LEGAL DEPARTMENT, OCCIDENTAL TOWER
5005 LBJ FREEWAY
DALLAS, TEXAS 75244

19 TELEPHONE:

20 */ A separate signature page must be signed by each corporation, individual or other legal entity
21 that is settling with the United States.
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